(25,008)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 298.

THE DUNCAN TOWNSITE COMPANY, PLAINTIFF IN ERROR,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1916.

Court of Appeals of the District of Columbia.

No. 2822.

FRANKLIN K. LANE, &c., Appellant,
vs.
THE DUNCAN TOWNSITE CO., &c.

a Supreme Court of the District of Columbia.

At Law. No. 51824.

THE DUNCAN TOWNSITE COMPANY, Petitioner,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed July 29, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 51824.

THE DUNCAN TOWNSITE COMPANY, Petitioner,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

Your petitioner respectfully represents:

That it is a corporation duly incorporated under the laws of the State of Oklahoma for the purpose of buying, subdividing, selling and improving real estate in and near the Town of Duncan, State of Oklahoma, and files this petition in its own right.

2. That the respondent, Richard A. Ballinger, is a citizen of the

United States, temporarily residing in the District of Columbia, and is the Secretary of the Interior, an officer of the Government of the United States.

3. That your petitioner is entitled as purchaser for value without notice of any claims against the title of the Indian allottee, as was those through whom your petitioner deraigns title, F. M. Head and Emma Gamblin, the grantees from the heirs of said Indian allottee, one Nicholas Alberson, in fee simple to the following described land located in the Chickasaw Nation in the Indian Territory: The east half of the northwest quarter and the east half of the west half of
2 the northwest quarter of Section 32 in township 1 north, range 7 west of the Indian Meridian, said lands now being a part of the townsite of Duncan, State of Oklahoma, and situated in what was formerly the Chickasaw Nation, the same being the homestead lands of Nicholas Alberson.

4. That under the provisions of various agreements or treaties between the United States and the Choctaw and Chickasaw Nations of Indians and of various Acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of enrolling on final rolls to be approved by the Secretary of the Interior the names of members by blood of the Choctaw and Chickasaw Nations of Indians and of allotment in severalty among the members on said final approved rolls of the lands of the Choctaw and Chickasaw Nations, each member on said final approved rolls to be allotted a fair and equal share of the national or tribal lands theretofore held by each nation or tribe in common.

5. That the first act of Congress on the subject declared it to be the purpose of the United States to divide the tribal lands in severalty among the Indians to the end that the Indian Territory might be fitted for a state of the Union, but in early acts it was provided that no enrollment of any member on a tribal roll should be final nor any roll complete until the enrollment of the whole tribe was completed and that allotment of lands should not be approved by the Secretary of the Interior until the lands of any one tribe were surveyed and allotment of the same among all members on the
3 tribal rolls completed, and that the lands allotted should be non-transferable until after full title was acquired and meanwhile should be non-taxable and non-liable for any obligations contracted by the allottee.

6. That by the Act of Congress approved June 28, 1898 (30 Stat. at L., 495) it was provided:

"That as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the allottees patents conveying to him all the right, title and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him,"

the United States having parted with its reversionary interest in said lands in consideration of the Indian tribes agreeing to allot-

ment in severalty, and certain other valuable considerations to the United States moving.

7. That the work of enrollment and allotment progressing slowly and little advance made in division of the land in severalty or fitting of the Indian Territory for statehood prior to the year 1901, Congress by Act approved July 1, 1902 (32 Stat. at L., 641), which was ratified by the Choctaw and Chickasaw Nations September 25, 1902, provided in part as follows:

"SEC. 28. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in Sec. 27 hereof, shall be placed upon the rolls made by said Commission.

* * * * * * *

"SEC. 30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens * * * the said Commission shall from time to time and as early as practicable forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Choctaw and Chickasaw tribes * * * upon which allotment of land and distribution of other tribal property shall be made as herein provided.

* * * * * * *

4 "SEC. 35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement, and any person or persons who may conceal the death of anyone on said rolls as aforesaid, for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be preceeded against as may be provided in other cases of felony, and the penalty of this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto, a forfeiture to the Choctaw and Chickasaw Nations of the lands, other tribal property, and proceeds so obtained."

"SEC. 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided land equal in value to 320 acres of the average allottable land of the

Choctaw and Chickasaw nations * * * as soon as practicable after the approval by the Secretary of the Interior of his enrollment.

"SEC. 12. * * * Each member of said tribes shall at the time of the selection of his allotment designate as a homestead out of said allotment land equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw nations."

"SEC. 71. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection (the law giving certain preferences of selection and right to contest selections to citizens)".

"SEC. 22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement, and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor.

"SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SEC. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

"SEC. 69. All controversies arising between members as to their right to select particular tracts of land shall be determined by the Commission to the Five Civilized Tribes."

"SEC. 66. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records."

"SEC. 72. There shall be paid to each citizen of the Chickasaw Nation, immediately after the approval of his enrollment and right to participate in distribution of tribal property, as herein provided, the sum of forty dollars."

That by the act approved April 21, 1904 (33 Stat. at L., 189), all the restrictions upon alienation of all adult allottees not of Indian blood in all the Five Civilized Tribes were removed and the Secretary of the Interior was authorized in writing to remove the re-

strictions on alienation of all other adult allottees and an appropriation of $30,000 was made "for the purpose of placing allottees in the Indian Territory in possession of their allotments."

That by the Indian Appropriation Act approved March 3, 1905, it was made the duty of the Secretary of the Interior to in-
6 vestigate any lease of allotted land which he had reason to believe had been obtained by fraud or in violation of tribal agreements and where the evidence warranted it to refer the matter to the Attorney-General for suit in the United States court to cancel the same.

That by the Act, "To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April 26, 1906, it was provided:

"SEC. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, and if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees or other conveynaces affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior.

"SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek or Seminole tribe, or the governor of the Chickasaw tribe shall fail, refuse or neglect for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument."

"SEC. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior".

That in the Five Civilized Tribes pursuant to the provisions of these statutes enrollments were approved in partial lists and
7 allotments selected as soon as practicable after approval of enrollments. That with the approval of the Secretary of the Interior restrictions were removed from allottees prior to issuance of patents and lands sold under sealed bids by the Secretary or by the individual allottee, leases made by allottees were approved prior to patent and operations begun thereunder and townsites were laid out and improved on allotted, but unpatented lands.

8. That application was duly made for the enrollment of Nicholas Alberson as a Chickasaw Indian by blood and it was found by the Secretary of the Interior or the Dawes Commission acting under his direction that Nicholas Alberson was entitled to enrollment as a blood member of the Chickasaw Nation who had died on or about October 2, 1902, and a final roll containing his name was duly and regularly approved by the Secretary of the Interior on December 12, 1902. That thereafter an administrator of his estate was appointed by the proper court, the United States district court for the Southern District of the Indian Territory, and selected an allotment of land as by the statute in such cases made and provided, the land selected including among other lands the following tracts for which allotment certificates dated September 17, 1904, issued by the Dawes Commission acting under the direction of the Secretary of the Interior, are now held by your petitioner as conclusive evidence of an adjudication by the lawful authorities that the heirs of Nicholas Alberson are entitled to the lands therein described and as a conveyance of said lands to the heirs of the deceased Indian: The east half of the northwest quarter, and the east half of the West
8 Half of the northwest quarter of Section 32, township 1 north, range 7 west, and the southwest quarter of the southwest quarter of the northeast quarter of section 32, township 1 north, range 7 west, and the west half of the southwest quarter of the northeast quarter and the east half of the southeast quarter of the northwest quarter of section 4, township 1 south, range 7 west and N. W.^{4} N. W.^{4} N. W.^{4} Sec. 21 and N. W.^{4} N. W.^{4} N. W.^{4} —Sec. 22 Twp. 1 south Range 7, W.^{2}.

9. That by deed acknowledged the 19th day of September, 1904, and recorded September 22, 1904, B. F. Alberson an enrolled member of the Chickasaw Nation, representing himself to be under the statutes in such cases made and provided, and describing him in said deed as the sole and only heir of Nicholas Alberson, deceased, for the consideration of $1,250 to him paid, transferred and conveyed to Emma Gamblin by general warranty deed the lands hereinbefore described comprising the homestead of Nicholas Alberson and also the following other lands:

The west half of the northwest quarter of the northwest quarter, and the southwest quarter of the southwest quarter of the northeast quarter of section thirty-two township 1 north, range 7 west.

That your petitioner is informed and believes that the consideration paid for said lands was at the time of transfer not inadequate and that the said Emma Gamblin purchased said lands and paid the purchase price thereof without knowledge of any fraud practiced, if any were practiced, on the Secretary of the Interior or any one acting under his direction to secure the enrollment of
9 the name of Nicholas Alberson on the final approved rolls of the Chickasaw Nation and the allotment of lands in his name, and that the said Emma Gamblin did not acquire said lands knowing that Nicholas Alberson had died on or prior to September 25, 1902, if he in fact did die before that date. An affidavit by Emma Gamblin that she bought said lands subsequently conveyed

by mesne conveyances by her to your petitioner for value bona fide and without notice that Nicholas Alberson or his heirs were not entitled thereto is attached hereto, marked Petitioner's Exhibit A-1" and is prayed to be read as a part hereof, the same as though incorporated herein.

10. That thereafter the said Emma Gamblin took peaceful possession of the lands herein described and long continued in the quiet possession of the same. That on, to wit, the 29th day of August, 1908, Kizzie Apala Taylor and Cornelia Hames filed a bill in equity against the said Emma Gamblin in the United States district court for the Southern District of Indian Territory claiming to be entitled to a one-half interest in the allotment sold by B. F. Alberson to Emma Gamblin on the ground that said B. F. Alberson was not the sole heir of Nicholas Alberson, that the said Nicholas Alberson had died intestate on or about October 2, 1902, and that complainants as the surviving children of Peter Alberson, a brother of Nicholas Alberson who had predeceased him, were equally entitled under the statutes in such cases made and provided with B. F. Alberson to the lands selected as the allotment of Nicholas Alberson. That thereafter the sum of $1,190 was paid to the said Kizzie Apala Taylor and Cornelia Hames for their interest in the lands and they with their respective husbands executed a general warranty deed dated February 18, 1907, and recorded March 25, 1907, in the proper recording office conveying all their right, title and interest in the lands allotted to Nicholas Alberson to the aforesaid Emma Gamblin and judgment in the suit aforesaid filed by them was entered up in favor of Emma Gamblin aforesaid, said proceedings being had and money paid at request of F. M. Head in order to quiet title. A true copy of the judgment referred to is attached hereto marked "Petitioner's Exhibit A-2" and is prayed to be read as a part hereof the same as though incorporated herein.

11. That Emma Gamblin and her husband, Joe Gamblin, thereupon entered into an agreement to sell, transfer and convey for the sum of $6,500 to F. M. Head, grantor of your petitioner, certain of the lands forming part of the allotment selection of Nicholas Alberson, the greater part of said lands being those covered by the homestead selection and certificate of allotment of said Nicholas Alberson, the lands embraced in the homestead allotment of Nicholas Alberson deceased being thus described in the homestead allotment certificate issued in the name of the said Nicholas Alberson:

"East half of northwest quarter of section 32, township 1 north, range 7 west, 80 acres.

"East half of West half of northwest quarter of section 32, township 1 north, range 7 west, containing 40 acres."

That pursuant to the agreement herein set forth the same Emma Gamblin and husband Joe Gamblin executed a general warranty deed dated February 12, 1907, and recorded March 15, 1907, in the proper recording office conveying to F. M. Head for the consideration of $6,500 all their right, title and interest in and to the following described lands comprised within the allotment selected on behalf of Nicholas Alberson, deceased:

"The east half of the northwest quarter, and the east half of the west half of the northwest quarter of section 32, in township 1 north, range 7 west, of the Indian meridian."

That in and by said deed the aforesaid Emma Gamblin and Joe Gamblin, her husband, covenanted that they were lawfully seized in fee of the land just herein described, free from all incumbrances and that they had a good right to sell and convey. That F. M. Head aforesaid had no knowledge to the contrary of the covenants in said deed conveyed and had no knowledge that Nicholas Alberson had, if such be the fact, died prior to the 25th day of September, 1902, and was not entitled to an allotment of lands in the Choctaw and Chickasaw nations and the said Head did not knowingly take a deed to and acquire title to the lands herein described with information of any claim that the date of Nicholas Alberson's decease was prior to September 25, 1902, but on the contrary believed the same to be a valid and lawful allotment, that Nicholas Alberson was lawfully and in fact entitled to enrollment and allotment. That said Head prior to making said purchase herein described employed a reliable and competent title examiner or title abstractor to examine the title to the land he was about to purchase. That said title examiner or abstractor reported that he had carefully searched the records with reference to the title to said property, and that the title was perfect in Emma Gamblin. That said F. M. Head purchased said property
12 in reliance on the report of the title examiner aforesaid and without any knowledge of any claim the title to said real estate described herein was not perfect or that any question was made with reference to the date of death of Nicholas Alberson and without any record at the date of said purchase appearing on the rolls of the Five Civilized Tribes to the effect that the date of death of Nicholas Alberson subsequent to September 25, 1902, was a subject of dispute or question. Affidavits from the title examiner or abstractor, Robert L. Marsh, and F. M. Head are attached hereto, marked "Petitioner's Exhibit A-3" and are prayed to be read as a part hereof the same as though incorporated herein.

12. That thereafter the real estate bought by F. M. Head as hereinbefore set forth was transferred and conveyed to your petitioner the Duncan Townsite Company and subdivided, placed on the market for sale as an addition to the townsite of Duncan, Oklahoma, and houses erected thereon by your petitioner without knowledge on its part or that of its officers or agents that Nicholas Alberson had, if such be the fact, died prior to September 25, 1902, and was not entitled to an allotment of land in the Choctaw and Chickasaw nations.

13. That your petitioner recently learned that the Secretary of the Interior has undertaken to cancel the name of Nicholas Alberson as an enrolled blood member of the Chickasaw Nation and has placed or caused to be placed on each of the five final approved blood rolls of the Chickasaw Nation or tribe a notation opposite the name of Nicholas Alberson, as follows: "Died prior to September 25, 1902. Not entitled to land or money." That your petitioner is
13 informed and believes that this notation was placed or caused to be placed on each of said rolls by the Secretary of the In-

terior on or about the month of January, 1909, and that orders were issued that no patent should be issued in the name of Nicholas Alberson to the lands nor any part thereof selected as his allotment and that no rights in said allotment or any part thereof should be recognized as existing in any person claiming the allotment of Nicholas Alberson or any part thereof by, from or through the heirs or personal representatives of said Nicholas Alberson. That your petitioner is advised that the notation and orders herein referred to were made because long after the approval of the final blood roll of the Chickasaw Nation containing the name of Nicholas Alberson and the allotment of lands to him and issuance of allotment certificates to said lands in the name of Nicholas Alberson, namely, sometime in the year 1906, after the heirs of said Nicholas Alberson had, as hereinbefore set forth, parted with all their interest in the allotment of Nicholas Alberson and disposed of the proceeds of sale and after the lands had largely increased in value by the growth of the Town of Duncan there was brought to the attention of the Commission to the Five Civilized Tribes by some person to your petitioner unknown, but by your petitioner believed to be some of the parties, including an attorney, who had profited by sale of the allotment and who was seeking to allot other Indians on the same lands, allegations that Nicholas Alberson had died prior to September 25, 1902. That your petitioner is informed and believes the matter was investigated in an ex parte manner and without a hearing given any parties in
14 interest in the years 1906 and 1907 by the Commission to the Five Civilized Tribes and a decision or purported decision rendered on or about October 28, 1907, by the said Commission to the effect that Nicholas Alberson had died prior to September 25, 1902, and that the allotment made in his name should be canceled. Your petitioner is informed and believes and therefore avers that some of the parties on whose testimony this purported decision was rendered were heirs of Nicholas Albertson who had sold their interest in his allotment, and who claimed to have been drunk when they previously had testified that the date of death was in October, 1902. That a copy of what purported to be the decision of the Commission to the Five Civilized Tribes just referred to your petitioner has just been informed by a letter of the Secretary of the Interior refusing its demand for a patent as herein prayed was mailed on October 30, 1907, to L. P. Hudson, of Ardmore, Oklahoma, administrator of the estate of Nicholas Alberson, and to T. L. Wright, an attorney of the same place notifying them that they would be allowed to show cause at a named time and place before the Commission to the Five Civilized Tribes why the allotment selection made by said Hudson as administrator for Nicholas Alberson should not be canceled for the reason that Alberson died prior to September 25, 1902, and that no notice was taken of said notification by the administrator or attorney aforesaid, whereupon upon recommendation made by the Commission to the Five Civilized Tribes the Secretary of the Interior did on January 11, 1908, cause the notation hereinbefore re-

ferred to, to be made on each final approved roll and cancel-
15 ation of the allotment made years previously. Your petitioner avers that no notification was sent to or opportunity afforded your petitioner or any of the grantees immediate or remote from the heirs of Nicholas Alberson, and who at the time of the hearing were the parties beneficiary interested to show cause why the allotment made should not be canceled and your petitioner is advised, and therefore avers, that the action taken by the Commission to the Five Civilized Tribes and the Secretary of the Interior is a denial to your petitioner of due process of law, that the Secretary of the Interior and those acting under his direction are without lawful authority or jurisdiction to cancel the allotment of Nicholas Alberson and especially without notice or opportunity to your petitioner and its grantees, direct or remote, from the heirs of Nicholas Alberson to be heard and to show that they are bona fide purchasers for value without notice of any fraud practiced in securing the enrollment of Nicholas Alberson on the final approved blood rolls of the Chickasaw Nation or tribe. That your petitioner is advised and believes, and therefore avers, that the only lawful mode of procedure is by criminal prosecution against the parties to the fraud, if any fraud there be, and a judicial determination of forfeiture of so much of the allotment of Nicholas Alberson or proceeds thereof as may be traced into the possession of parties knowingly taking said allotment or part thereof or proceeds thereof though aware of the death of Nicholas Alberson prior to September 25, 1902, but your petitioner is informed and believes that no such procedure has been taken, but that on the contrary an attempt has been made recently to
16 allot all or part of the lands purchased by your petitioner as hereinbefore mentioned to parties instigated to take said lands in allotment by parties hereinbefore mentioned as privy to the attempted unlawful deprivation of your petitioner of the same.

14. That your petitioner has respectfully made demand of the Secretary of the Interior that he cause patent to be prepared and executed and recorded in the name of Nicholas Alberson to the lands herein referred to as having been purchased bona fide for value and without notice of any fraud by your petitioner, but said demand has been by the respondent hereto or his First Assistant Secretary of the Interior delegated by him for the purpose refused and instead your petitioner has been informed that allotment certificates to said land have been issued or attempted to be issued to other parties to whom it is purposed to issue patents unless the respondent be otherwise commanded by judicial proceedings. Your petitioner avers that the action taken by the Secretary of the Interior and the notation placed opposite the name of Nicholas Alberson on the final approved rolls constitutes a cloud on the title of your petitioner and has caused and will cause it great and irreparable injury that is beyond estimate, and that the arbitrary and unlawful act of the Secretary of the Interior in causing the notation herein referred to to be placed opposite the name of Nicholas Alberson and of respondent in cancelling so much of the allotment of Nicholas Alberson as was purchased bona fide by your petitioner and of refusing to permit the patent in the

name of said Nicholas Alberson of same and instead of attempting to allot the same to others, deprives petitioner of its property without due process of law in violation of the Fifth Amendment
17 to the Constitution of the United States.

15. Petitioner states that the reasonable present value of the lands purchased by petitioner and the subject-matter of this suit is largely in excess of the sum of ten thousand dollars.

Wherefore, inasmuch as the Honorable Richard A. Ballinger, Secretary of the Interior, has refused to execute, deliver and record or permit to be executed, delivered, or recorded a patent in the name of Nicholas Alberson and for the benefit of your petitioner for the land described herein, and stated to have been purchased bona fide by your petitioner and as the law provides no other adequate remedy in the premises whereby your petitioner can secure the patent aforesaid to which it is entitled and whereof your petitioner is now deprived, your petitioner says:

1. That a writ of mandamus may be issued and directed to the Honorable Richard A. Ballinger, Secretary of the Interior, commanding him to erase or cause to be erased the notations placed opposite the name of Nicholas Alberson on the final approved blood rolls of the Chickasaw Nation and also commanding him to execute, deliver and record in the name of Nicholas Alberson a patent to the land described herein as having been purchased bona fide by your petitioner.

2. And for such other and further right or rights or relief as to the Court may seem proper and the nature of your petitioner's case may require.

And as in duty bound your petitioner will ever pray.

THE DUNCAN TOWNSITE COMPANY,
By F. M. HEAD, *Sec. & Mgr., Petitioner.*

KAPPLER & MERILLAT,
FINN & YOUNG,
Attorneys for Petitioner.

18 COUNTY OF COMANCHE,
State of Oklahoma:

Before the subscriber, a Notary Public, in and for the County of Comanche, State of Oklahoma, on the 26th day of June, A. D. 1909, personally appeared F. M. Head, who made oath on the Holy Evangels of Almighty God that he is the Secretary & business Manager of the Duncan Townsite Company, the within petitioner, and is authorized by it to institute these proceedings in its name; that the facts as stated in said petition of deponent's personal knowledge are true, and those stated upon information and belief he believes to be true.

F. M. HEAD.

Subscribed and sworn to before me this 26th day of June, A. D. 1909.

[SEAL.] JOHN M. YOUNG,
Notary Public.

By commission will expire May 10th, 1910.

19 *Rule to Show Cause.*

Filed July 22, 1909.

* * * * * * *

On consideration of the petition for the writ of mandamus filed in the above-entitled cause, it is by the Court this 22 day of July, 1909, ordered that the respondent show cause on or before the 5th day of August, 1909, why the writ of mandamus should not issue as prayed.

WRIGHT, *Justice.*

(*Marshal's Return.*)

Served copy of within rule to show cause on Richard A. Ballinger, Secretary of the Interior, by service on Frank Pierce, acting Secretary.

July 22, 1909.

AULICK PALMER, *Marshal.*
S.

20 *Respondent's Answer.*

Filed September 25, 1909.

* * * * * * *

Frank Pierce, First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, while especially reserving to himself all benefit *to* any exception to the uncertainties and defects of the petition filed herein, and to the lack of jurisdiction in this court to grant a writ of mandamus compelling the performance by him of duties involving the exercise of judgment and discretion (such being the character of the act, performance of which is sought by this proceeding), nevertheless to make answer to said petition, says:

1-2. He admits the allegations of the first and second paragraphs.

3. He denies the allegation, in the third paragraph contained, that relator is entitled to the land therein described and denies that said lands were ever lawfully the homestead lands of said Nicholas Alberson.

4-5. He admits the allegations of the fourth and fifth paragraphs.

6. He admits that the act of June 28, 1898 (30 Stat., 495) contains the excerpt quoted in the sixth paragraph, but denies that the United States thereby or therefore had parted with its reversionary interest in said lands.

7. He admits the existence of those excerpts from the statutes of the United States set forth in the seventh paragraph, but suggests to

the court that they are not complete, especially section 12,
21 copied on page 4 of said petition, from which there has been omitted after the words "Choctaw and Chickasaw Nations," the following material portion of said section:

* * * as nearly as may be, which shall be alienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

He also suggests that the phrase "the law giving certain preferences of selection and right to contest selections to citizens" is no part of section 71, copied *in* page 4 of said petition. He denies, as alleged on page 5 of said petition, that the operation of the act of April 21, 1904 (33 Stat., 189), was to remove all the restrictions upon alienation of all adult allottees not of Indian blood, and avers that said act expressly excepts homesteads from its operation, both as to allottees not of Indian blood as well as "all other allottees." He admits that the act of March 5, 1905 (33 Stat., 1060), contains the provision averred on page 6 of said petition. He admits that enrollments were approved in partial lists and that allotments were selected as soon as practicable after approval of said enrollments; that leases were made as alleged; and that for a time, through oversight incident to a press of business in that behalf, restrictions were removed and allotments were sold prior to issuance of patents; all of which was known to Congress, which, by act of April 26, 1906 (34 Stat., 137), confirmed such sales where the sole objection thereto was the lack of patent or deed, yet without validating those invalid on other accounts, such as lack of right of enrollment.

22 8. Answering the allegations of the eighth paragraph, he denies that an application for the enrollment of Nicholas Alberson was duly made, but admits that an application for such enrollment was improperly presented upon false representations as to the date of said Alberson's death; and he further admits that a roll containing his name was thereafter approved by said Secretary of the Interior as alleged; but he avers that such enrollment and approval were induced by fraud; in this: that under the provisions of law, no member of the Choctaw or Chickasaw Nation was entitled to enrollment unless said member was alive at the time of ratification of the Choctaw and Chickasaw agreement on September 25, 1902, and the enrollment and approval as aforesaid of the name of Nicholas Alberson were made upon representations that said Alberson was alive until on or about the second day of October, 1902, when in truth and in fact, said Alberson died many months prior to the ratification of said Choctaw and Chickasaw agreement; and he further avers that these facts were well known to the parties procuring such enrollment.

He admits that an administrator was appointed as alleged and that an allotment of land was selected. As to the lands involved in this proceeding, he avers that the E./2 of N. W./4 and the E./2 of N. W./4 of N. W./4, Sec. 32, T. 1, N. R. 7 W., I. M., werd selected as the homestead portion of said Alberson allotment and

were embraced in a notice of selection dated September 17, 1904; and that the E./2 of S. W./4 of N. W./4 of said section 32 was not selected nor included in any notice of selection prior to
23 September 20, 1904, when it was designated as a part of the surplus allotment of said Alberson. He avers that the other lands described in said paragraph 8 were selected and are embraced in notices of selection as follows: under date of September 17, 1904, and as surplus lands, the W./2 of S. W./4 of N. E./4 and the E./2 of S. E./4 of N. W./4 of Sec. 4, T. 1 S., R. 7 W., and the N. W./4 of N. W./4 of N. W./4 of Sec. 21, T. 1 S., R. 7 W.; under date of September 20, 1904, and as surplus, the N. W./4 of S. W./4 of N. W./4 of Sec. 22, T. 1 S., R. 7 W.

But he denies that allotment certificates were issued on September 17, 1904, or September 20, 1904, or for many months thereafter, as will hereinafter appear, or that when issued they were in force, intent, or effect conveyances of said lands to the heirs of the deceased Indian or that, having been procured by fraud and perjury, they constitute conclusive evidence of title to the land. He admits that said certificates evince an adjudication by lawful authorities that said lands had been selected in the name of Nicholas Alberson, but avers as aforesaid that such adjudication was procured through and by deliberate fraud and misrepresentations of a material fact upon which the right to allotment in the name of Nicholas Alberson depended.

9. He admits, as alleged in the ninth paragraph, that one B. F. Alberson, representing himself to be the sole heir of said Nicholas Alberson, on September 19, 1904, did by deed undertake to convey the lands described to one Emma Gamblin, but avers that said conveyance was executed and delivered prior to issuance of allotment certificates covering the land herein involved, and even be-
24 fore the selection of a part of said land, viz., the E./2 of S. W./4 of N. W./4 of Section 32 aforesaid. He further avers that said B. F. Alberson was one of the witnesses upon whose false and perjured testimony the enrollment and allotment of Nicholas Alberson were made.

As to the allegation concerning the adequacy of consideration or the lack of knowledge on the part of said Emma Gamblin as to the fraudulent character of the enrollment and allotment aforesaid, or of her knowledge of the fact that Nicholas Alberson died prior to September 25, 1902, respondent has no knowledge and can not answer.

He also avers that at the time of selection of the E./2 of S. W./4 of N. W./4 of Section 32 aforesaid (and being a part of the land now in controversy), the said described tract was a part of the allotment selection of one Winnie Baken, to whom an allotment certificate had issued; that by reason of that fact the application on behalf of the estate of Nicholas Alberson, September 20, 1904, was denied and on that day contest was instituted by said estate; that said contest was not determined until July 17, 1905, when a decision was rendered by the Commissioner to the Five Civilized Tribes in favor of said estate; that subsequent to the time when said

Alberson attempted to convey said land to said Gamblin, other contests were instituted against other portions of the allotment selection, and on October 12, 1905, the S. W./4 of S. W./4 of N. E./4 of said Section 32, was awarded, as a result of one contest, to one Joseph S. Mullen, and on June 30, 1905, as the result of another contest, the W./2 of N. W./4 of N. W./4 of said Section
25 32, was awarded to one Eliza Ellen Rector. He therefore avers, as touching the good faith of said Emma Gamblin, that she was bound to know at the time of her alleged purchase of the land that the law authorized the institution of contest proceedings against any or all of said land within nine months from date of selection and that said Alberson, even if no fraud were present, could not convey legal title to any part of said land; that in fact such contests were instituted during her alleged ownership of the land and that thirty acres thereof, including twenty acres involved in this application for mandamus, were awarded to certain citizens of the said Choctaw and Chickasaw Nations.

10. He has no information other than in said paragraph 10 contained, whether said Emma Gamblin thereafter took and continued in, peaceable possession of said land, and therefore can not answer said allegation, on belief or otherwise. He admits, however, that on August 29, 1906, one Kizzie Apala Taylor and one Cornelia James brought action to recover their alleged half interest in said lands, and thereafter attempted to convey said interest to said Gamblin as alleged, and that an agreed judgment was entered in said suit, on, to wit, April 25, 1907. And, he avers, the said Kizzie Apala Taylor well knew that said Nicholas Alberson died prior to September 25, 1902.

11. He admits that on or about February 12, 1907, said Emma Gamblin and her husband entered into a contract with one F. M. Head, whereby they attempted to convey to said Head the lands in controversy; that a warranty deed was executed on said date, to be placed in escrow, and subsequently delivered to said Head;
26 that $3,000 of the consideration was to be paid by said Head to said Gamblin at the time of executing said deed and the balance ($3,500) at time of delivery. He is informed and believes, and therefore avers that said consideration ($6,500) was less than the full value of the property. He is also informed and believes that said Head did have knowledge at the time of said purchase of said land and prior thereto that title to the same was in question and that the legality of the enrollment and allotment of said Nicholas Alberson was then, and had been, the subject of investigation by the Commissioner to the Five Civilized Tribes, and he therefore denies that said Head was without knowledge or information as to the legality of said enrollment and selection. He denies that prior to making said purchase, said Head employed a title examiner to make an abstract of title to the land involved and that he purchased said property in reliance on the report of said examiner. He further avers that the purported abstract of title was made and concluded several days subsequent to the delivery and record of the deed from said Emma Gamblin to said Head. He also avers that

said abstract fails to show any examination of the records of the office of the Commissioner to the Five Civilized Tribes; that had said records been examined, they would have shown that long prior to said Head's purchase of the land in controversy, fraud had been charged and proceedings had been instituted by the Commissioner to the Five Civilized Tribes to cancel said allotment; that on, to wit, the 20th day of September, 1906, testimony had been taken before said Commissioner showing that said Nicholas Alberson died
27 prior to September 25, 1902; that the taking of said testimony was resumed on October 12, 14, 17, 29, 1906; that on November 1, 1906, the said Benjamin F. Alberson admitted, in the taking of evidence as to said Nicholas Alberson's right to an allotment, the fraud perpetrated in securing said allotment, that on February 12, 1907, Kizzie Apala Taylor, at a time when her suit against Emma Gamblin was pending, on the day that said Gamblin conveyed to said Head, and eight days before she, the said Taylor, executed her deed of said lands to said Head, appeared before a representative of the Commissioner to the Five Civilized Tribes and admitted under oath that Nicholas Alberson died at her house in August, 1900; that during all this time and at the time of the attempted purchase of said land by said Head, said proceeding was pending in the office of the Commissioner to the Five Civilized Tribes, culminating on October 28, 1907, in a decision that said Nicholas Alberson was not entitled to an allotment; that during all this time this proceeding was a matter of public record in the office of said Commission to the Five Civilized Tribes, and was notice to the world that the right of said Nicholas Alberson to an allotment was in question and under investigation; that the absence of any certificate as to what the records in said Commissioner's office disclosed, in said alleged abstract of title, was in itself sufficient to have put an ordinarily prudent man on notice; that the cancellation of the selection of twenty acres of the land involved was a matter of public record in the office of said Commissioner and notice to said Head that as to a part, at least of the land, his grantors had no title to convey to him; that fraud in the enrollment of
28 deceased Indians as a basis for allotment was notorious in the Choctaw and Chickasaw Nations and that no man of ordinary prudence would dare to purchase land inherited from a deceased allottee without prior careful investigation of the records of the office of the Commissioner to the Five Civilized Tribes, which alone could furnish information as to the validity of the enrollment, of the allotment, and of the integrity of the heir's title to the allotment; that the absence of recourse to this easily available and well known source of information, in this case, on the part of said Head or the relator was and is such gross negligence as to estop him or relator from posing as innocent purchasers to the detriment of the Choctaw and Chickasaw Nations.

12. He admits that said Head conveyed his interest in said land to the relator, the Duncan Townsite Company, of which he is an officer, owning one-half the stock thereof; but he is informed and believes, and therefore avers, that houses have not been erected on

said land, and that, on the contrary, the said land is used as a pasture and has been leased for that purpose. He also avers that said Head's knowledge of the fraudulent nature of the enrollment and allotment was the knowledge of said Duncan Townsite Company.

13. He admits that the Secretary of the Interior has canceled the name of Nicholas Alberson from the rolls of citizenship of the Chickasaw Nation as alleged; and that the notation mentioned in paragraph 13 was directed to be made by said Secretary of January 11, 1908, and not in January, 1909, as alleged; but he denies that any orders were then issued relating to issue of patents as alleged, although he admits that no patents could be issued to those claiming under Nicholas Alberson as a consequence of the cancellation of the name of said Alberson from the rolls.

He admits that some time in the year 1906, information was received by the Commissioner to the Five Civilized Tribes to the effect that said Alberson had died prior to September 25, 1902; but he is not informed and therefore can not state on belief or otherwise, as to the source of this information; nor has he any information as to whether the lands involved had then largely increased in value. He denies that this information was received and proceedings instituted to cancel the enrollment of said Nicholas Alberson "after the heirs of said Nicholas Alberson" had parted with all their interest, as alleged; and avers that the alleged undivided half interest claimed by Kizzie Apala Taylor and Cornelia James, mentioned in paragraphs 10 of the petition and this answer, was not disposed of until long after said proceedings had been instituted and evidence therein, including the testimony of said Kizzie Apala Taylor, had been taken as aforesaid.

He denies that said investigation was conducted without affording any parties in interest a hearing, and states that, on the contrary, B. F. Alberson, who had claimed to be the sole heir of said Nicholas Alberson, was present and testified, admitting under oath that his affidavit to the effect that Nicholas Alberson died after September 25, 1902, was made by him at a time when he was drunk and that its contents were not true. He also avers that Kizzie Apala Taylor was at said hearing and testified. He admits that as a result of these hearings and of the admissions of B. F. Alberson and of the other witnesses upon whose testimony Nicholas Alberson had previously been enrolled, viz., that said testimony was false, a decision was rendered by the Commissioner to the Five Civilized Tribes on or about October 28, 1907, to the effect that in point of fact Nicholas Alberson was not alive on September 25, 1902, and was therefore not entitled to enrollment or to lands and money of the Chickasaw Nation. He further admits, as alleged, that said L. P. Hudson, administrator, and T. L. Wright, attorney of record in the proceeding for enrollment of said Nicholas Alberson were duly notified to appear and show cause at a certain time and place why the said Commissioner should not recommend to the Secretary of the Interior the cancellation of the allotment selections made by said Hudson on the ground that said Alberson died prior to the date of

the ratification of the Choctaw and Chickasaw agreement, and that said Hudson and Wright did not appear or respond to said notice. And he also avers that said T. L. Wright was one of the witnesses to the execution of the deed taken by said Head from Kizzie Apala Taylor and Cornelia James, referred to in paragraph 11 of this answer, and that he acted as the attorney for Emma Gamblin, or F. M. Head, in that transaction. And he further admits that the said Secretary did cause the notation hereinbefore referred to, to be made as alleged.

He admits that no notification of said proceedings was sent to petitioner, and avers that said alleged grantees of the alleged Alberson heirs, including petitioner, were not parties of record in
31 the office of the Commissioner to the Five Civilized Tribes to any matter affecting the alleged allotment rights of said Nicholas Alberson; that the allotments had been made by said Hudson as administrator and that due notice, as aforesaid was given him. He further avers that said petitioner was not entitled to notice and has not been denied due process of law. He denies that the Secretary of the Interior, or those acting under him, were without lawful authority in the premises, as under existing law, the matter of allotment of land to members of the Five Civilized Tribes is committed to the exclusive jurisdiction of the Commissioner to said Tribes, acting under the supervision and direction of the Secretary of the Interior.

He is advised that the allegation as to "the only lawful mode of procedure" obtaining in this case is purely a conclusion of law requiring no answer, although to his silence is not to be imputed any admission as to the soundness of that conclusion.

He admits that upon cancellation of the enrollment of said Nicholas Alberson and of the selection of allotment in his name, the land involved became part of the lands of the Chickasaw Nation, and have been selected as the allotment of others, citizens of said Nation, entitled to allotments of land; but he has no knowledge or information that the parties so selecting these lands were instigated thereto by any one as alleged, and therefore cannot answer on belief or otherwise, as to verity of the last allegation of said paragraph 13.

14. He admits the allegations in the 14th paragraph, in so far as they relate to a demand for patent by the relator and the re-
32 fusal thereof by the respondent. But he denies the allegations that said action of respondent or the notation complained of constitutes a cloud on relator's title, or that said act was arbitrary or unlawful, or that his action in any respect deprives relator of property without due process of law. He avers that any and all so-called title to the land involved in said relator has its origin solely and exclusively in the fraudulent enrollment and selection of land in the name of Nicholas Alberson. He is advised and believes, and therefore avers that the issuance of a patent to relator as prayed would be not only without authority of law, but in defiance of the Choctaw and Chickasaw agreement prohibiting the allotment of land or the distribution of tribal property in the name of an Indian not alive on September 25, 1902, and in perpetuation of a fraud.

15. He admits that the value of the land involved largely exceeds the sum of $10,000.

Further, and more fully answering the rule to show cause, he avers that relator is not entitled to the writ of mandamus for the purposes prayed, as the writ does not lie where it is sought by the proceedings to perpetuate a fraud; that a decree ordering the fulfillment of the first prayer of said petition, commanding your respondent to erase or cause to be erased the notations opposite the name of Nicholas Alberson on the final rolls of the Chickasaw Nation, and to issue a patent in his name, would vitalize and perpetuate a fraudulent enrollment and allotment duly canceled after due process of law; that the relator's title is no greater than that of his grantors, one of whom, Kizzie Apala Taylor, well knew the fraudulent nature of said Alberson's enrollment and allotment at the time of her conveyance to said Head, and the other, Emma Gamblin, as your respond-
33 ent is informed and believes and therefore avers, knew at the time of her conveyance to said Head that the validity of said enrollment and allotment was under investigation; that relator knew or should have known, if he had exercised the care of an ordinarily prudent man, of the fraudulent nature of said enrollment and allotment prior to his attempted purchase of the lands in controversy.

He further avers that the action of which relator complains was not a ministerial act, but a judicial determination by the Secretary of the Interior of matters exclusively committed by law to his discretion; and as such is not controllable by mandamus.

Wherefore, for the reasons and on account of the facts set forth in this return, it is respectfully submitted that this court is without jurisdiction in this proceeding for mandamus to consider the application of the relator, or by mandate to control the discretionary action of your respondent.

And having fully answered and made return to the rule to show cause, he prays that said rule be dismissed, with his reasonable costs, and that he be discharged from further duty in answering thereunto.

FRANK PIERCE,
Acting Secretary of the Interior.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDWARD WRIGHT,
Assistant Attorney, Counsel.

34 DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 24 day of September, 1909, Before me.

[SEAL.] W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

Amended and Substituted Demurrer.

Filed December 29, 1909.

* * * * * * *

Now comes the Relator and says that the answer of the Respondent in the above-entitled cause is bad in substance.

KAPPLER & MERILLAT,
Attorneys for Relator.

NOTE.—Among the points to be argued are:

1. That the answer sets forth no good and sufficient reason in law why patent should not issue to said land for the benefit
35 of Relator and why a peremptory writ of mandamus should not issue compelling the Respondent to deliver the patent in controversy to the Relator.

2. That the answer shows that an allotment certificate to the land in controversy was duly issued in the name of Nicholas Alberson and said allotment certificate is by law a conveyance of the land in controversy and conclusive evidence of the allottee's right thereto, and thereafter no duty remained in the Secretary but the ministerial duty of issuing the patent as further assurance of the right of the allottee to the same, which right by mesne conveyances lawfully made has passed to Relator.

KAPPLER & MERILLAT,
Attorneys for Relator.

December 29, 1909.

It is hereby consented and agreed that the above may be filed as a substitute for the demurrer hitherto filed in said cause.

OSCAR LAWLER,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Att'ys for Respond't.

36 Supreme Court of the District of Columbia.

FRIDAY, April 22nd, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Upon consideration of petitioner's demurrer filed herein to respondent's answer, it is ordered that said demurrer be, and the same is hereby sustained.

Respondent's Amended Answer.

Filed October 27, 1911.

* * * * * * *

Comes now Walter L. Fisher, Secretary of the Interior, and with leave of court first obtained, amends his return to the rule to show cause herein issued, and says:

1-2. He admits the allegations of paragraphs 1 and 2 of the petition.

3. He denies the averments of paragraph 3.

4-6. He admits the averments of fact in paragraphs 4, 5 and 6 but denies that the reversionary interest of the United States was parted with prior to approval of deed by the Secretary of the Interior upon allotment legally made.

7. As to matters of law and excerpts from statutes set forth in the 7th paragraph of said petition, respondent suggests that
37 the same are irrelevant and redundant, and that the same are inaccurate and incomplete, all of which will more fully appear by inspection of the United States Statutes at Large (Vol. 33, p. 189), to which reference is hereby made.

Respondent is advised and believes that the legal conclusions set forth on page 5 of said petition, as to the operation and effect of the act of Congress of April 21, 1904 (33 Stat., 189), concerning restrictions upon alienation by adult allottees not of Indian blood, are irrelevant and redundant, and that the same are incorrect.

He admits that enrollments were approved in partial lists and that allotments were selected as soon as practicable after approval of said enrollments; that leases were made as alleged; and that for a time, through mistake and oversight incident to a press of business in that behalf, restrictions were removed and allotments were sold prior to issuance of patents.

8. Answering the allegations of paragraph 8 of said petition, respondent avers the facts with respect to the enrollment of Nicholas Alberson and the subsequent selection of allotment in his name, to be as follows:

The name of Nicholas Alberson was included upon census field card No. 36, of the Chickasaw roll, the number assigned thereto on the roll subsequently submitted, being 107 of the Dawes roll—this field list being prepared about March 6, 1899—at a time when said Nicholas Alberson is admitted to have been alive and it was presumably made upon his application, although this latter fact does not affirmatively appear upon the record; that no application of any kind appears on the records for the further enrollment
38 of Nicholas Alberson as a member of the Chickasaw tribe of Indians for the purpose of participating in the distribution of the property of that tribe; that his name was, without submission of proof that he was alive on September 25, 1902, included upon the first partial roll submitted by the Dawes Commission, which partial roll was received at the Department of the Interior December 10, 1902 contained 1,168 names of Chickasaw citizens by blood, and

was approved by the Secretary of the Interior December 12, 1902; that the Chickasaw agreement (32 Stat., 641), inhibited the enrollment of any Indian who died before September 25, 1902; that as respondent is informed and believes and therefore avers, well knowing the fact to be that said Nicholas Alberson died prior to said last-mentioned date, and was not entitled to be enrolled, and that neither he nor his heirs in his name were qualified to take an allotment of land in said Chickasaw Nation, and further well knowing the fact to be that said Nicholas Alberson resided and died intestate in the central judicial district of the Indian Territory, and that he did not die or own land in the southern judicial district of said Territory yet, on, to wit, the 15th day of September, 1904, one L. P. Hudson applied to the court having probate jurisdiction in the southern judicial district of said Indian Territory but not having jurisdiction to issue letters of administration on the estate of a decedent dying intestate in any other judicial district without owning real property within said southern judicial district for letters of administration on the estate of said Nicholas Alberson, fraudulently representing to the court that said Nicholas Alberson died on the first day of
39 October 1902, and intestate, and that one B. F. Alberson was his sole heir at law; whereas in truth and in fact said Nicholas was not alive on September 25, 1902, but had died in August, 1900, as was then and there well known to said Hudson and said B. F. Alberson; that, accompanying said application, said Hudson filed with said court certain false and untrue affidavits, which he, the said Hudson, as respondent is informed and believes and therefore avers, then and there knew to be false and untrue, one executed by said B. F. Alberson, claiming to be the sole heir of said Nicholas, in each of which affidavits it was falsely stated that said Nicholas was alive on September 25, 1902, and was therefore entitled to an allotment of land in said Chickasaw Nation; that also accompanying said application, said Hudson filed, or caused to be filed, a waiver of the right of administration purporting to have been executed by said B. F. Alberson on September 3, 1904, in favor of said Hudson, but which instrument had been subsequent to said September 3, 1904, and prior to September 15, 1904, altered by some party to the respondent unknown, without the knowledge or consent of said B. F. Alberson, by the unauthorized substitution of the name of said Hudson therein for that of one J. W. Morris to whom it was originally purported to be made; that on said September 15, 1904, said court for said southern judicial district, misled and deceived by the representations of said Hudson and so misled and deceived in believing that said Nicholas Alberson had died subsequent to said September 25, 1902, and was therefore entitled to share in the allotment of the land of the Chickasaw Nation, and unadvised of his lack of jurisdiction to grant letters of adminis-
40 tration by reason of the fact that said Nicholas had neither domicile nor real estate within the jurisdiction of his court, and deceived in regard thereto, inadvertently, erroneously, and without jurisdiction issued to said Hudson letters of administration on the estate of said Nicholas Alberson; that thereupon, to wit, on

September 17, 1904, said Hudson, acting under the letters of administration thus fraudulently and unlawfully obtained, appeared at the proper land office for the allotment of land in the Chickasaw Nation, and still falsely and fraudulently pretending and representing that said Nicholas was entitled to an allotment, and that he was alive on September 25, 1902, and that he, this said Hudson, was the lawfully appointed administrator of the estate of said Nicholas, applied for and selected, as a part of the allotment to the estate of said Nicholas, among other lands not involved in this suit, the E. ½ N. W. ¼ and E. ½, N. W. ¼ N. W. ¼, Sec. 32, T. 1 N., R. 7 W., I. M., which was then and there designated as the homestead portion of said Nicholas Alberson's allotment; that subsequently, to wit, on September 20, 1904, said Hudson again appearing as aforesaid at said land office, applied for and selected as a part of the allotment to the estate of said Nicholas, among other lands not involved in this suit, the E. ½ S. W. ¼ N. W. ¼, of section 32 aforesaid; but he denies that allotment certificates for said selections were issued on the dates named, and avers the fact to be that an allotment certificate covering the E. ½ N. W. ¼ and E. ½ N. W. ¼ N. W. ¼ aforesaid was not issued and sent to said Hudson until January 23, 1905 and that the allotment certificate covering the E. ½ S. W. ¼ N. W. ¼ aforesaid was not issued and sent to said Hudson until April 7, 1906. He further denies that said, or any, allotment cer-

41 tificates were ever or at all issued on September 17, 1904, for the above-described tracts of land or any other tract of land mentioned in relator's petition but not involved in this suit; and he further alleges that the evidentiary effect of said allotment certificates, as he is advised and believes, is a mere conclusion of law having no place in pleading.

9. Answering the allegations of paragraph 9 of said petition, respondent avers that the alleged deed from B. F. Alberson to Emma Gamblin was prior to the issuance of any allotment certificate in the name of Nicholas Alberson; that even if allotment might have been lawfully made in the name of Nicholas Alberson, yet the allotted property was by law burdened with a restriction against alienation and the alleged transfer on the 19th day of September, 1904, was in violation thereof. Respondent further is informed and believes and therefore alleges the fact to be that said allotment of land in the name of Nicholas Alberson and the subsequent transfer to Emma Gamblin were made in pursuance of a corrupt and fraudulent scheme to cheat, wrong, and defraud the United States, and its officers, and the said Indian Nation; of which fraud and of the facts aforesaid and particularly of those in paragraph 8 herein alleged, said Emma Gamblin had, as the defendant is informed and believes and therefore alleges the fact to be, at the time of and prior to the execution of, or the payment of any consideration for, said alleged transfer, notice and knowledge.

10. Referring to paragraph 10 of said petition, respondent

42 admits the institution of suit by Kizzie Apala Taylor and Cornelia James, as plaintiffs, against said Emma Gamblin, as defendant, asserting that said B. F. Alberson was not sole heir of

Nicholas Alberson, deceased, and that plaintiffs therein were heirs at law and entitled to succeed to one-half of the estate of said Nicholas Alberson, deceased, but, respondent denies that said suit was instituted on August 29, 1908. On the contrary, he alleges the fact to be that said suit was instituted on June 28, 1905, and that, as he is informed and believes, and, therefore, alleges the fact to be, said Emma Gamblin had notice and knowledge of the facts as to the heirs of said Nicholas set forth in the complaint in said action long prior to the time of the institution thereof, and prior to the payment of any consideration whatever for said deed.

He denies that Kizzie Apala Taylor and Cornelia James, or either of them, executed warranty, or any, deed for any lands described in said petition after August 28, 1908, but, on the contrary, he is informed and believes and therefore alleges the fact to be, that the only deeds to such lands ever executed by said parties last named are of date respectively February —, 1907, and February 26, 1907, true copies of which said deeds, including notarial certificates of acknowledgment thereon, are hereto attached, made a part hereof and marked Exhibits A and B.

That said deeds were duly acknowledged so as to entitle the same to be recorded, and the same were recorded in the office of the register of deeds for the county of Stephens, Oklahoma, on the 7th day of March and the 25th day of March in the year 1907, respectively.

11-12. Referring to paragraph 11 of said petition, re-
43 spondent is informed and believes and therefore alleges the fact to be, that F. M. Head, did, at the time of and prior to the execution and delivery to him of, and before the payment by him of any consideration for, any deed for any of the property described in said petition, have knowledge that said Emma Gamblin and Joe Gamblin and said Kizzie Apala Taylor and Joe T. Taylor, her husband, and Cornelia James and Walton James, her husband, were not, and that neither of said persons was, seized in fee, or seized at all, of the lands described in such deed, and had knowledge of the fact that said Nicholas Alberson died prior to the 25th day of September, 1902, and that said Nicholas Alberson was not entitled to enrollment or allotment of any lands, and that the estate of said Nicholas Alberson, deceased, had no interest whatsoever, in any of the lands described in said petition.

Respondent states that, as he is informed and believes, and therefore alleges the fact to be, said F. M. Head had, prior to taking, and prior to the payment by him of any consideration for, any of said deeds, notice and knowledge of all of the facts and matters and things set forth in said respective deeds, as to the heirs of Nicholas Alberson, and also of the fact that said Nicholas Alberson died prior to the 25th day of September, 1902, and that said Nicholas Alberson was not, nor was his administrator, entitled to select any allotment, and that said B. F. Alberson, Cornelia James, Kizzie Apala Taylor, and Emma Gamblin did not, nor did either of such persons, have any right, title or interest whatsoever in any of the lands described in the petition herein, or in
44 the alleged deeds to said Head.

Respondent is informed and believes and therefore alleges

the fact to be, that said F. M. Head is now, and at all times since its incorporation, has been, a director and the principal stockholder of said petitioner, Duncan Townsite Company, and has, during all of said time, controlled the business and operations of said corporation and that said petitioner took the conveyance from Head alleged in pargaraph 12 of the petition herein with full knowledge of all the facts known by said Head as aforesaid.

13. He admits that the Secretary of the Interior has canceled the name of Nicholas Alberson from the rolls of citizenship of the Chickasaw Nation as alleged, and that the notation mentioned in paragraph 13 was directed to be made by said Secretary on January 11, 1908, and not in January, 1909, as alleged; but he denies that any orders were then issued relating to issue of patents as alleged, although he admits that because of the cancellation of the name of said Alberson from the rolls, no patents could be issued to those claiming under said Nicholas Alberson.

He admits that some time in the year 1906, information was received by the Commissioner to the Five Civilized Tribes to the effect that said Alberson had died prior to September 25, 1902; that on, to wit, the 20th day of September, 1906, testimony had been taken before said Commissioner showing that said Nicholas Alberson died prior to September 25, 1902; that the taking of said testimony was resumed on October 12, 14, 17, 29, 1906; that on November 1, 1906, the said Benjamin F. Alberson admitted, in the taking of evidence as to said Nicholas Alberson's right to an allot-
45 ment, the fraud perpetrated in secuirng said allotment; that on February 12, 1907, Kizzie Apala Taylor, at a time when her suit against Emma Gamblin was pending, on the day that said Gamblin conveyed to said Head, and eight days before she, the said Taylor, executed her deed of said lands to said Head, appeared before a representative of the Commissioner to the Five Civilized Tribes and admitted under oath that Nicholas Alberson died at her house in August, 1900; that during all this time and at the time of the attempted purchase of said land by said Head, said proceeding was pending in the office of the Commissioner to the Five Civilized Tribes, culminating on October 28, 1907, in a decision that said Nicholas Alberson was not entitled to an allotment; that during all this time this proceeding was a matter of public record in the office of said Commissioner to the Five Civilized Tribes, and was notice to the world that the right of said Nicholas Alberson to an allotment was in question and under investigation; that the absence of any certificate as to what the records in said Commissioner's office disclosed, in said alleged abstract of title, was in itself sufficient to have put an ordinarily prudent man on notice; that fraud in the enrollment of deceased Indians as a basis for allotment was notorious in the Choctaw and Chickasaw Nations and that no man of ordinary prudence would dare to purchase land inherited from a deceased allottee without prior careful investigation of the records of the office of the Commissioner to the Five Civilized Tribes, which alone could furnish information as to the validity of the enrollment, of the allotment, and

of the integrity of the heirs' title to the allotment; that the absence of recourse to this easily available and well known source of
46 information, in this case, on the part of said Head or the relator was and is such gross negligence as to estop him or relator from claiming to be innocent purchasers to the detriment of the Choctaw and Chickasaw Nations. And the respondent is informed and believes, and therefore alleges that at the time of and prior to the taking of said conveyance by Gamblin from Kizzie Taylor and Cornelia James, and the taking of said conveyance by Head from Kizzie Taylor and Cornelia James, and the taking of said conveyance by Head from Gamblin, and by petitioner from Head, all of them—to wit: Gamblin, Head, and petitioner—had notice and knowledge of said investigation and taking of testimony, and also not only of the fact that Nicholas Alberson had died long prior to September 25, 1902, but that information to that effect had reached the Commissioner to the Five Civilized Tribes as aforesaid; and further alleges that it was a matter of common notoriety in the community that the alleged Nicholas Alberson allotment was fraudulent and the title valueless, of which said Gamblin, Head and petitioner had notice and knowledge.

He denies that this information was received and proceedings instituted to cancel the enrollment of said Nicholas Alberson "after the heirs of said Nicholas Alberson" had parted with all their interest, as alleged; and avers that the alleged undivided half interest claimed by Kizzie Apala Taylor and Cornelia James, mentioned in paragraph 10 of the petition and this answer, was not disposed of until long after said proceedings had been instituted and evidence therein, including the testimony of said Kizzie Apala Taylor,
47 had been taken as aforesaid.

He denies that said investigation was conducted without affording any parties in interest a hearing, and states that, on the contrary, B. F. Alberson, who had claimed to be the sole heir of said Nicholas Alberson, was present and testified, admitting under oath that his affidavit to the effect that Nicholas Alberson died after September 25, 1902, was made by him at a time when he was drunk and that its contents were not true. He also avers that Kizzie Apala Taylor was at said hearing and testified as aforesaid, and that Cornelia James had notice and knowledge of the hearing and investigation. He admits that as a result of these hearings a decision was rendered by the Commissioner to the Five Civilized Tribes on or about October 28, 1907, to the effect that in point of fact Nicholas Alberson was not alive on September 25, 1902, and was therefore not entitled to enrollment or to lands or money of the Chickasaw Nation. He further admits, as alleged, that said L. P. Hudson, administrator, and T. L. Wright, attorney of record in the proceeding for allotment of said Nicholas Alberson, were duly notified to appear and show cause at a certain time and place why the said Commissioner should not recommend to the Secretary of the Interior the cancellation of the allotment selections made by said Hudson on the ground that said Alberson died prior to the date of the ratification

of the Choctaw and Chickasaw agreement, and that said Hudson and Wright did not appear or respond to said notice. And he also avers that said T. L. Wright is the same person whose name is signed as one of the witnesses to the purported execution of the alleged deed taken by said Head from Kizzie Apala Taylor and Cornelia
48 James, referred to in paragraph 11 of this answer. And he further admits that the said Secretary did cause the notation hereinbefore referred to, to be made as alleged.

He admits that no notification of said proceedings was sent to petitioner, and avers that said alleged grantees of the alleged Alberson heirs, including petitioner, were not parties of record in the office of the Commissioner to the Five Civilized Tribes to any matter affecting the alleged allotment rights of said Nicholas Alberson; that the allotments had been selected by said Hudson as administrator and that due notice, as aforesaid, was given him. He further avers that said petitioner was not entitled to notice and had not been denied due process of law. He denies that the Secretary of the Interior, or those acting under him, were without lawful authority in the premises, as under existing law the matter of allotment of land to members of the Five Civilized Tribes is committed to the exclusive jurisdiction of the Commissioner to said tribes, acting under the supervision and direction of the Secretary of the Interior.

He is advised that the allegation as to "the only lawful mode of procedure" obtaining in this case is purely a conclusion of law requiring no answer, although to this silence is not to be imputed any admission as to the soundness of that conclusion.

He admits that upon cancellation of the enrollment of said Nicholas Alberson and of the selection of allotment in his name, the land involved became part of the lands of the Chickasaw Nation, and has been selected as the allotment of others, citizens of said nation,
49 entitled to allotments of land; but he has no knowledge or information that the parties so selecting these lands were instigated thereto by any one as alleged, and therefore can not answer on belief, or otherwise, as to the verity of the last allegation of said paragraph 13.

14. He admits the allegations in the 14th paragraph, in so far as they relate to a demand for patent by the relator and the refusal thereof by the respondent. But he denies the allegations that said action of respondent or the notation complained of constitutes a cloud on relator's title, or that said act was arbitrary or unlawful, or that his action in any respect deprives relator of property without due process of law. He avers that any and all so-called title to the land involved in said relator has its origin solely and exclusively in the aforesaid fraudulent and void administration and attempted selection of land in the name of Nicholas Alberson. He is advised and believes and therefore avers that the issuance of a patent to relator as prayed would be not only without authority of law, but in defiance of the Choctaw and Chickasaw agreement (Sec. 35, Act July 1, 1902, 32 Stat., 641), prohibiting the allotment of land or the distribution of tribal property to a person, or to the heirs of any person, whose name is on the rolls and who died prior to final

ratification of the agreement, September 25, 1902, and in perpetuation of a fraud.

15. He admits that the value of the land involved largely exceeds the sum of $10,000.

Further, and more fully answering the rule to show cause, he avers that relator is not entitled to the writ of mandamus
50 for the purposes prayed, as the writ does not lie where it is sought by the proceedings to perpetuate a fraud; that a decree ordering the fulfillment of the first prayer of said petition, commanding your respondent to erase or cause to be erased the notations opposite the name of Nicholas Alberson on the final rolls of the Chickasaw Nation, and to issue a patent in his name, would vitalize and perpetuate a fraudulent allotment duly canceled after due process of law; that the relator's title is no greater than his predecessor's, none of whom was an innocent purchaser; that relator knew, and is chargeable with knowledge, for, if he had exercised the care of an ordinarily prudent person would have learned and known, of the fraudulent nature of said allotment prior to its attempted purchase of the lands in controversy and that the restrictions against alienation prevented its transfer even if the allotment had been valid.

He further avers that the action of which relator complains was not a ministerial act, but a judicial determination by the Secretary of the Interior of matters exclusively committed by law to his discretion; and as such is not controllable by mandamus.

Wherefore, for the reason and *no* account of the facts set forth in this return, it is respectfully submitted that this court is without jurisdiction in this proceeding for mandamus to consider the application of the relator, or by mandate to control the discretionary action of your respondent, or to require that he disregard the plain provisions of the statute.

And, having fully answered and made return to the rule to show cause, he prays that said rule be discharged, and the
51 petition dismissed, with his reasonable costs, and that he be discharged from further duty in answering thereunto.

WALTER L. FISHER,
Secretary of the Interior.

CHARLES W. COBB,
Assistant Attorney General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Attorneys.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Walter L. Fisher, being first duly sworn, says that he is Secretary of the Interior; that he has read over the foregoing answer by him

subscribed; that the matters and things therein set forth, he is informed are true, and he believes them to be true.

WALTER L. FISHER.

Subscribed and sworn to this 26 day of October, 1911; before me,

[SEAL.] W. BERTRAND ACKER,
Notary Public.

52 *Replication.*

Filed February 14, 1912.

* * * * * * *

The Relator joins issue on the answer filed by the Respondent in the above-entitled cause.

KAPPLER & MERILLAT,
Attorneys for Relator.

Judgment of Mandamus.

Filed January 19, 1915.

* * * * * * *

Come now here as well the Relator as the Respondent, by their respective attorneys, whereupon the cause was duly heard and considered by the Court upon the petition of the Relator, the amended answer of the Respondent and the testimony taken by the Relator and the Respondent, and it being found by the Court that the Relator and its immediate grantors, Frank Head, and Emma Gamblin were innocent purchasers for value, without notice, and in reliance upon the verity of the official records of the Department of the Interior.

Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent, Franklin K. Lane, be, and he hereby is, commanded within twenty days after this date to issue or cause to be issued and be recorded among the proper official records of the Department of the Interior and in such places as patents to lands in the Choctaw and Chickasaw Nations are
53 duly and customarily recorded, a patent conveying all the right, title and interest of the Choctaw and Chickasaw Nations and of the United States in and to the particular tracts of land heretofore conveyed to relator out of the allotment of lands in the Choctaw and Chickasaw Nations finally allotted to and in the name of Nicholas Alberson, a deceased Choctaw Indian, as the lawful allotment of land of said Nicholas Alberson in the Choctaw and Chickasaw Nations.

It is further considered, ordered and adjudged that the costs in this proceeding be, and the same hereby are, awarded to the Relator against the Respondent, and that judgment therefor shall be duly

entered and execution for the same issued, as by law in such cases made and provided.

The respondent thereupon in open court by counsel excepted to the judgment so rendered and noted an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, and pending such an appeal, the judgment is stayed and no writ shall run out thereon against the Respondent.

WENDELL P. STAFFORD, *Justice.*

January 19th, 1915.

54 *Assignment of Errors.*

Filed February 11, 1915.

* * * * * * *

The appellant, Franklin K. Lane, Secretary of the Interior, assigns the following errors in the decision and judgment of the Supreme Court of the District of Columbia in the above-entitled cause:

(1) The court erred in failing to hold that the allotment proceedings had in respect to Nicholas Alberson as a deceased member of the Choctaw tribe of Indians, and the evidence of title to real estate based thereon were utterly void and wholly without legal effect, and that the doctrine of innocent purchaser has no application to such a case.

(2) The court erred in failing to recognize and to hold that legal title to the land demanded is yet in the Indian tribe and in the United States; and that until issuance and recordation of patent thereto the Secretary has jurisdiction to inquire into and decide whether any allotment certificate improvidently issued was fraudulently procured, and to cancel the same if fraudulently procured.

(3) The court erred in failing to hold that where an allotment certificate is improperly procured and should not have been issued in the first instance by reason of the fact that the person in whose name allotment was made had in fact not lived to such date as entitled him to allotment and was not in existence at any date which would have entitled him to enrollment or allotment, it is the duty of the Secretary of the Interior to cancel such certificate, and that in the performance of that duty, the courts will not interfere.

55 (4) The court erred in failing to hold that so long as the legal title has not been conveyed, a purchaser from a holder of an allotment certificate fraudulently procured, stands in no better position than the original person named in the certificate, and that such purchaser is not entitled to invoke the doctrine of innocent purchaser for value.

(5) The court erred in failing to hold that so long as the legal title to the land has not been conveyed, it is the duty of the Secretary, and within his power, when it is brought to his attention that an allotment certificate has been improvidently and improperly

issued, to cancel such certificate, even though the party to whom such certificate so issued has attempted to convey the land or any part of it to a third party.

(6) The court erred in failing to hold that so long as the legal title to the land has not been conveyed, it is the duty of the Secretary, and within his power, when it is brought to his attention that an allotment certificate has been improvidently and improperly issued, to decline to issue any further or additional paper evidence of title, even though the party to whom such certificate so issued has attempted to convey the land or any part of it to a third party.

(7) The court erred in failing to hold that where an allotment certificate is improperly and improvidently issued, the courts will not compel the Secretary of the Interior to issue any further or additional paper evidence of title.

(8) The court erred in awarding a writ of mandamus compelling the Secretary of the Interior to cause patent to issue
56 conveying legal title to land, now vested in the Choctaw Nation of Indians and in the United States, in effectuation and perpetuation of a fraud against said Indian nation and against the United States.

(9) The court erred in failing to deny the writ of mandamus, to dismiss the petition for mandamus, and to discharge the rule issued thereon.

PRESTON C. WEST,
Solicitor for the Department of the Interior;
C. EDW. WRIGHT,
Assistant Attorney,
Attorneys for Appellant.

Designation of Record.

Filed February 11, 1915.

* * * * * * *

The Clerk of the Court in preparing the transcript of the record on the appeal of the respondent in the above-entitled cause will include therein the following:

(1) The Petition and the Rule to show cause.
(2) The Answer.
(3) Amended demurrer filed December 29, 1909.
(4) Order sustaining demurrer with leave to amend answer.
(5) The Amended Answer filed October 27, 1911, omitting the exhibits attached.
(6) The Replication.
57 (7) Order for mandamus and notation of appeal.
(8) Assignment of errors.
(9) The Designation.

PRESTON,
Solicitor for the Department of the Interior;
C. EDWARD WRIGHT,
Assistant Attorney,
Attorneys for Appellant.

Memoranda.

February 16, 1915.—Time to file transcript of record and agreed statement of evidence extended to and including April 1, 1915.

March 26, 1915.—Time to file transcript of record and agreed statement of evidence extended to and including May 18, 1915.

May 17, 1915.—Agreed Statement of Facts approved for purposes of appeal herein and made of record.

58 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 57, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51824 at Law, wherein The Duncan Townsite Company, a Corporation, is Petitioner and Richard A. Ballinger, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of May, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

59 In the Supreme Court of the District of Columbia.

At Law. No. 51824.

UNITED STATES ex Rel. DUNCAN TOWNSITE COMPANY
v.
THE SECRETARY OF THE INTERIOR.

Agreed Statement of Facts.

It is hereby stipulated and agreed between counsel for the parties in the above-entitled action that the following are the material facts in the case:

That Nicholas Alberson, a Chickasaw Indian by blood, without formal application or hearing, or fraud on the part of any of the parties hereinafter mentioned, was duly enrolled by the Dawes Commission on a partial roll of blood members of the Chickasaw Nation and said partial roll was duly approved by the Secretary of the Interior December 12, 1902. That Nicholas Alberson died leaving as his heirs at law B. F. Alberson, Kizzie Apala Taylor, and Cornelia James.

That on or about September 15, 1904, one L. P. Hudson applied to the court having probate jurisdiction in the Southern Judicial District of Indian Territory for letters of administration on the estate of said Nicholas Alberson, representing to the court that said Alberson died on or about October 2, 1902, intestate, and that said B. F. Alberson was his sole heir at law; that he accompanied said application with certain affidavits, one executed by said B. F.
60 Alberson, a brother of Nicholas Alberson, in which it was stated that said Nicholas Alberson was alive on September 25, 1902, and had died October 2, 1902, leaving B. F. Alberson as his only heir at law; that said Hudson also filed or caused to be filed through his attorney, one T. L. Wright, with said application a waiver of the right of administration executed by said B. F. Alberson on September 3, 1904, and that on September 15, 1904, said court duly issued letters of administration upon the estate of said Nicholas Alberson to said Hudson.

That on September 17, 1904, said Hudson, acting as administrator appeared at the proper land office for the allotment of land in the Chickasaw Nation, and duly selected as a part of the allotment to the estate of said Nicholas, among other lands not involved in this suit, the E./2 N. W./4 and E./2 N. W./4 N. W./4, Sec. 32, T. 1 N., R. 7 W., I. M., which were then and there designated as the homestead portion of said Nicholas Alberson's allotment; that subsequently, on September 20, 1904, said Hudson selected as a part of the allotment to the estate of said Nicholas the E./2 S. W./4 N. W./4 of said section 32; that thereafter, and on January 23, 1905, an allotment certificate covering the E./2 N. W./4 and E./2 N. W./4 N. W./4, aforesaid, was duly issued in the name of said Nicholas Alberson and was sent to said Hudson, administrator, and that on April 7, 1906, a similar allotment certificate covering the E./2 S. W./4 N. W./4, aforesaid, was duly issued and sent to said Hudson.

That on September 19, 1904, by deed afterwards duly recorded in the proper land records of the district in which the lands are
61 situated on September 22, 1904, said B. F. Alberson describing himself in said deed as the sole and only heir of said Nicholas Alberson, stating in said deed that Nicholas Alberson had died October 2, 1902, for a consideration of $1,250 to him actually paid in money transferred and conveyed by general warranty deed the lands hereinbefore described to one Emma Gamblin; that the said Emma Gamblin paid the consideration and received the deed in good faith, believing said Alberson to be the sole heir of the deceased Nicholas, and that the latter had an allottable status and upon the advice of her attorney to whom B. F. Alberson had stated that his brother died in October, 1902.

That on June 28, 1905, Kizzie Apala Taylor and Cornelia James instituted a suit in the United States territorial court for the district in which the lands are situated against Emma Gamblin, alleging said B. F. Alberson was not the sole heir of said Nicholas, that said Nicholas Alberson had died October 2, 1902, but that they, the plaintiffs, were heirs at law and entitled to succeed to one-half of

the estate of the said Nicholas; that thereafter, to wit, on February 18, 1907, by deed recorded March 27, 1907, said Taylor and James, pursuant to a prior agreement to which F. M. Head was a party, in consideration of $1,190 to them paid by said Emma Gamblin, conveyed all their right, title, and interest in the lands allotted, as aforesaid, in Nicholas Alberson to said Gamblin and judgment in the suit aforesaid was duly entered up in favor of said Gamblin;
62 that at the time of said payment to said Taylor and James said Emma Gamblin and her attorneys had no knowledge that any question had been raised as to the right of said Nicholas Alberson to enrollment or allotment; that the deed conveying the land in controversy from B. F. Alberson to Emma Gamblin had been duly recorded on September 22, 1904, in the land records of Stephens County, Oklahoma, where the lands are situated; that in May, 1907, the attorney for F. M. Head and Emma Gamblin, who also reported on the title and reported said title to be good in Emma Gamblin to F. M. Head, applied to the Dawes Commission for allotment certificates to the land in controversy and several days later the Dawes Commission duly forwarded said allotment certificates to said attorney and the same by him were duly recorded in the proper land recording district namely, Stephens County, prior to completing payment of the full consideration and delivery of deed, which had been in escrow, of the land in controversy from Emma Gamblin and husband to F. M. Head; that neither in forwarding the said allotment certificates nor at any other time did the Dawes Commission inform Emma Gamblin or F. M. Head or any one authorized to act for them that any controversy or question had arisen as to the lawful right of Nicholas Alberson to enrollment or allotment.

That the records of the Indian Office show that in the year 1906 information was received by the Commissioner to the Five Civilized Tribes to the effect that said Nicholas Alberson had died prior to September 25, 1902, and said Commissioner ordered an in-
63 vestigation, and on divers dates between September 20, 1906, and February 12, 1907, testimony was taken before said Commissioner showing that said Nicholas Alberson died prior to September 25, 1902; that among the witnesses so testifying were said B. F. Alberson and Kizzie Apala Taylor, who testified in English, one, that Nicholas Alberson died in August, 1900, and the others, that he died in 1901; that thereafter and without any testimony being adduced on behalf of any grantees of land allotted to or in the name of B. F. Alberson or his administrator and without any appearance by the administrator, on October 28, 1907, as the result of said hearing the said Commissioner rendered a decision to the effect that Nicholas Alberson was not alive on September 25, 1902, and therefore was not entitled to enrollment or to lands or moneys of the Chickasaw Nation; that the said Dawes Commission on October 30, 1907, notified L. P. Hudson, administrator, and one T. L. Wright, attorney of record for Hudson in the proceedings for allotment of lands to said Nicholas Alberson, to appear and show cause at a certain time and place why said Commissioner should not rec-

ommend to the Secretary of the Interior the cancellation of the allotment selections made as aforesaid but sent no notice to Emma Gamblin or F. M. Head or the Duncan Townsite Company or any one representing them of said proceedings; that the said Hudson and Wright failed and neglected to appear or respond to said notices; that thereafter, on January 11, 1908, and pursuant to the recommendation of said Commissioner the Secretary of the Interior caused to be placed on the approved blood rolls of the Chickasaw
64 Nation a notation opposite the name of said Nicholas Alberson as follows: "Died prior to September 25, 1902. Not entitled to land or money," and that the allotment certificates hereinbefore mentioned were held for cancellation and the land allotted subsequently to other parties, no notice of any kind of any of said proceedings before the Dawes Commission or in the Interior Department being sent to or being had in fact by Emma Gamblin, F. M. Head or the Duncan Townsite Company.

That by general warranty deed dated February 12, 1907, recorded March 15, 1907, said Emma Gamblin and her husband, Joe Gamblin, for and in consideration of $6,500 to them paid by one F. M. Head, conveyed all their right, title, and interest to the E./2 N. W./4 and E./2 W./2 N. W./4, Sec. 32, aforesaid; that said Head took said deed and paid the consideration in good faith after having, through a title examiner, made investigation of the title to said land being informed by the title examiner the title was perfect; that neither Gamblin, Head nor the Duncan Townsite Company had any knowledge that the allotments were fraudulently obtained or that said Nicholas was not alive on September 25, 1902; that the Duncan Townsite Company, of which Head is president, is the successor to whatever interest or rights Head acquired from Emma Gamblin.

That on March 19, 1909, F. M. Head, through his attorneys, Kappler & Merillat, represented that he was the purchaser in
65 good faith of the lands herein described from Emma Gamblin, and requested that patent for the same issue in the name of Nicholas Alberson; that thereafter brief and argument in behalf of said Head and the Duncan Townsite Company were filed in the Department denying the jurisdiction of the Department and the case on the record was then and there considered; that on June 16, 1909, the Secretary through his First Assistant Secretary, held and determined that the request or demand for issuance of patent as aforesaid should not be acceded to and declined to issue the patent as prayed; whereupon the present cause of action was promptly filed; that after the pending cause at bar was at issue on petition, answer and replication testimony was taken in Oklahoma and Texas by counsel for relator and for respondent, and by said testimony it was sufficiently and satisfactorily established that relator and his grantor Emma Gamblin were purchasers of the land here in controversy in good faith for a valuable consideration without notice of any claim that Nicholas Alberson had died prior to September 25, 1902, and it was established that the allegations of fraud, actual or constructive, made against Emma Gamblin, F. M. Head, or either of them, in the amended answer were not well founded in fact.

66 It is conceded and is to be taken as the fact that Nicholas Alberson died prior to September 25, 1902, and that Emma Gamblin, F. M. Head, and the Duncan Townsite Company purchased said land as aforesaid and paid just and valuable considerations therefor in good faith and without any knowledge but that said Nicholas was alive, as their conveyances recited, at a date subsequent to September 25, 1902.

THE DUNCAN TOWNSITE COMPANY,

By Its Attorneys,

CHAS. H. MERILLAT.

THE SECRETARY OF THE INTERIOR,

By His Attorneys,

PRESTON C. WEST,

Solicitor for the Department of the Interior;

C. EDWARD WRIGHT,

Assistant Attorney.

Approved:

WENDELL P. STAFFORD, *Justice.*

[Endorsed:] In the Supreme Court of the District of Columbia. At Law No. 51824. United States of America ex rel. Duncan Townsite Co. vs. Franklin K. Lane, Secretary of the Interior. Agreed statement of facts. Department of the Interior. Office of the Assistant Attorney General.

Endorsed on cover: District of Columbia Supreme Court. No. 2822. Franklin K. Lane, &c., appellant, vs. The Duncan Townsite Co., &c. Court of Appeals, District of Columbia. Filed May 17, 1915. Henry W. Hodges, clerk.

MONDAY, October 4th, A. D., 1915.

No. 2822.

FRANKLIN K. LANE, Secretary of the Interior, Appellant,
vs.
THE DUNCAN TOWNSITE COMPANY, a Corporation, Appellee.

The argument in the above entitled cause was commenced by Mr. Preston C. West, attorney for the appellant, and was continued by Mr. C. H. Merillat, attorney for the appellee, and was concluded by Mr. Preston C. West, attorney for the appellant.

No. 2822.

FRANKLIN K. LANE, Secretary of the Interior, Appellant,
v.
THE DUNCAN TOWNSITE COMPANY, a Corporation.

(*Opinion.*)

Mr. Justice Van Orsdel delivered the opinion of the Court:

This cause is here on appeal from a judgment of the Supreme Court of the District of Columbia granting appellee, relator, a writ of mandamus to compel appellant, as Secretary of the Interior of the United States, to issue a patent for certain lands in the State of Oklahoma to one Nicholas Alberson, a deceased Chicksaw Indian.

From an agreed statement of facts upon which the case is submitted, it appears that the United States Commission to the Five Civilized Tribes, known as the Dawes Commission, acting under authority of Congress, without formal hearing placed on a partial list of members by blood of the Chickasaw Nation the name of Nicholas Alberson. This list was approved by the Secretary of the Interior December 12, 1902. Under the agreement between the United States and the Choctaw and Chickasaw Nations (32 Stats. L., 641), only the names of persons living on September 25, 1902, were entitled to have their names entered on the approved rolls. It is stipulated that Alberson died prior to that date, and that no legal authority existed for placing his name upon the rolls.

Under proceedings instituted in Oklahoma, one Hudson was appointed administrator of the estate of Alberson. As administrator, he selected the lands in controversy as part of the allotment to which Alberson would have been entitled had he been alive on September 25, 1902. It is through muniments of title procured from the heirs of Alberson that relator is here asserting its rights as an innocent purchaser.

In 1907, the Dawes Commission, after investigation, ascertained that Alberson had died prior to September 25, 1902, and that the certificate of allotment had been wrongfully issued to the administrator whose appointment had been procured by the fraud and perjury of a brother of Alberson. The finding of the commission being

brought to the attention of the Secretary of the Interior he caused to be placed on the approved rolls, January 11, 1908, opposite the name of Nicholas Alberson the following notation: "Died prior to September 25, 1902. Not entitled to land or money." He held the certificate of allotment for cancel-ation, and has since allotted the lands to other parties. It is conceded that relator had no notice of these proceedings.

Notwithstanding the concession that Alberson was illegally enrolled and that the certificate of allotment was fraudulently procured, relator insists that, because of the further concession that it was without knowledge of the fraud or of any irregularity in the enrol-ment and issuance of the allotment certificate, it is entitled to the relief here sought. Certain provisions of law are cited and relied upon as upholding relator's contention. The supplemental Choctaw-Chickasaw agreement embodied in the act of Congress of July 1, 1902, ratified by the Indians September 25, 1902 (32 Stats. L., 641), provided in section 23 that "allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

Undoubtedly, an allotment certificate under the above provision of statute gave to an allottee such an equitable possessory title to the property allotted as to forbid collateral attack, but that legal title can only pass to an allottee by patent seems settled by the act of Congress of April 26, 1906 (34 Stats. L., 137), which provides in section 5 thereof that "all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

It may well be that only the ministerial duty remains to the Secretary of the Interior of issuing a patent where the allotment certificate has been lawfully procured and no question of fraud is involved. Ballinger v. Frost, 216 U. S., 240. But a different situation is presented where, as in the present case, Alberson, the allottee, was not in existence on September 25, 1902, and was, therefore, not entitled to participate in the allotment of the tribal property. That it is within the supervisory power of the Secretary of the Interior to withhold the issuance of a patent for public lands when he is satisfied that the final certificate has been procured by fraud, is well settled. Cornelius v. Kessel, 128 U. S., 456. The same rule has been applied to Indian allotments. 24 L. D., 264; Lowe v. Fisher, 223 U. S., 95; Lynch v. Harris, 33 Okla., 23; Wallace v. Adams, 143 Fed., 716.

But we are asked to compel the Secretary of the Interior to perpetuate a fraud—to do an unlawful act—to issue a patent to a per-

son who, for the purposes of this case, never had any legal existence. Whatever standing relator might have in a proper action in a court of competent jurisdiction in Oklahoma to assert its claim of innocent purchaser, or to defend in an action by the Government to cancel the certificate of allotment, it is clear that it is not entitled to the relief here sought. The rights of innocent purchasers can not be adjudicated in this proceeding. The Secretary of the Interior is not required to look beyond Alberson, and, unless clear legal title can be established in him as allottee, the writ must be denied. The writ of mandamus is not a writ of right, and the remedy can only be invoked when the relief sought possesses sufficient merit to appeal to the sound discretion of the court. The party seeking its relief must come into court with clean hands, and with a clear legal right for which the law affords no adequate remedy. The writ will not, therefore, issue to compel the performance of a wrong or to confirm or perpetuate a fraud. Garfield v. Turner, 33 App. D. C., 195, affirmed, 222 U. S., 204.

The judgment is reversed with costs, and the cause is remanded for dismissal.

Reversed and remanded.

MONDAY, November 1st, A. D., 1915.

October Term, 1915.

No. 2822.

FRANKLIN K. LANE, Secretary of the Interior, Appellant,
vs.
THE DUNCAN TOWNSITE COMPANY, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court for dismissal.

Per MR. JUSTICE VAN ORSDEL,
November 1, 1915.

WEDNESDAY, November 3rd, A. D., 1915.

No. 2822.

FRANKLIN K. LANE, Secretary of the Interior, Appellant,
vs.
THE DUNCAN TOWNSITE COMPANY, a Corporation.

On motion of Mr. C. H. Merillat, attorney for the appellee, It is ordered by the Court that a writ of error to remove the above en-

titled cause to the Supreme Court of the United States issue, and the bond for costs is fixed in the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Franklin K. Lane, Secretary of the Interior, Appellant, and The Duncan Townsite Company, a corporation, Appellee, a manifest error hath happened, to the great damages of the said Appellee as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3rd day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, the Duncan Townsite Company, as principal, and J. H. Franklin and M. A. Hassenflu, as sureties, are held and firmly bound unto the Secretary of the Interior, Franklin K. Lane in the full and just sum of three hundred dollars to be paid to the said Franklin K. Lane, Secretary of the Interior, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of November, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the appellant Franklin K. Lane, Secretary of the Interior and the appellee, the Duncan

Townsite Company a judgment was rendered against the said appellee the Duncan Townsite Company and the said appellee the Duncan Townsite Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Franklin K. Lane, Secretary of the Interior citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said the Duncan Townsite Company shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Duncan Townsite Co.]

THE DUNCAN TOWNSITE CO., [SEAL.]
By JOHN H. SCOTT, *President.* [SEAL.]
J. H. FRANKLIN. [SEAL.]
M. A. HASSENFLU. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Attest:
FRANK M. HEAD,
Secretary.

O. K.
C. E. WRIGHT,
Att'y for Sec'y of the Interior.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2822. Franklin K. Lane, Secretary of the Interior, appellant, vs. The Duncan Townsite Company, a corporation. Bond on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Nov. 24, 1915. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Franklin K. Lane, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Duncan Townsite Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why

the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of November, in the year of our Lord one thousand nine hundred and fifteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 24 day of November 1915.

C. EDW. WRIGHT,
Counsel for Secretary of the Interior.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 21, 1915. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 44 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Franklin K. Lane, Secretary of the Interior, Appellant vs. The Duncan Townsite Company, a corporation. No. 2822, October Term, 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of November A. D. 1915.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 11-26-15. H. W. H., Clerk.]

Endorsed on cover: File No. 25,008. District of Columbia Court of Appeals. Term No. 298. The Duncan Townsite Company, plaintiff in error, vs. Franklin K. Lane, Secretary of the Interior. Filed November 26th, 1915. File No. 25,008.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 51.

THE DUNCAN TOWNSITE COMPANY,
Plaintiff in Error,

vs.

FRANKLIN K. LANE, *Secretary of the Interior.*

In error to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

CHAS. H. MERILLAT,
CHAS. T. KAPPLER,
Attorneys for Plaintiff in Error.

R. O. POLAND & SONS, LAW PRINTERS, N. W., WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 51.

THE DUNCAN TOWNSITE COMPANY,
Plaintiff in Error,

vs.

FRANKLIN K. LANE, *Secretary of the Interior.*

In error to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This is an appeal from an order and judgment of the Court of Appeals of the District (rec., p. 39), reversing a judgment of the Supreme Court of the District of Columbia, directing that a writ of mandamus should issue commanding the Secretary of the Interior (p. 29) to issue and record a patent so it would inure to plaintiff's benefit as purchaser, conveying certain land in the Choctaw and Chickasaw Nation, which had been transferred,

mediately, to the plaintiff in error as part of an allotment of lands made in the name of Nicholas Alberson, a deceased Choctaw Indian. The remainder of the allotment also has been purchased in good faith by one Emma Gamblin.

The Supreme Court of the District of Columbia, on April 22, 1910, by its then chief justice, sustained a demurrer filed by plaintiff in error (p. 20) to an answer (p. 12) made by defendant in error to the petition in mandamus (p. 1) filed by plaintiff in error. Under leave granted defendant thereupon filed an amended answer (p. 21), to which plaintiff in error filed a replication (p. 29), under which testimony was taken that defendant in error admits (agreed statement of facts, p. 32) completely disproved the averments of the amended answer.

The amended answer alleged in substance that the conveyance to plaintiff in error by one F. M. Head and to Head by one Emma Gamblin and to Emma Gamblin by the heirs of the deceased Indian, Nicholas Alberson, had each and all been made to the several grantees fraudulently and with knowledge on the part of each grantee that Alberson had died prior to September 25, 1902, and therefore was not lawfully enrolled by the Secretary of the Interior as a member of the Chickasaw Nation of Indians and that the allotment of lands in the name of Nicholas Alberson to inure to the benefit of his heirs was illegal, inasmuch as Nicholas Alberson had died too soon to be entitled to an allotment.

The amended answer averred that the allegations in the petition that the Duncan Townsite Company and its grantor, Head, and Emma Gamblin each and all were innocent purchasers for value of the land involved with-

out any notice that Nicholas Albers had died prior to September 25, 1902, if such be the fact, were untrue and that each and all were advised and knew he had died prior to September 25, 1902, and as the Secretary had decided after March 4, 1907. The original answer had averred that Head was not an innocent purchaser for value without notice and had been demurred to, and demurrer sustained, on the ground that if Emma Gamblin, the original grantee, were an innocent purchaser, her innocence operated to the benefit of all her subsequent grantees. Thereupon, the amended answer charged all parties in the chain of title with fraud, and issue was joined and full testimony taken.

FINDING OF THE TRIAL COURT AND DEFENDANT'S CONCESSIONS.

Upon a hearing of the cause the court found that the plaintiff in error "and its immediate grantors, Frank Head and Emma Gamblin, were innocent purchasers for value, without notice, and in reliance upon the verity of the official records of the Department of the Interior" (p. 29). The writ of mandamus was ordered to issue.

The foregoing finding of the court is conceded by defendants to be correct. Since the appeal was taken from the decision of the Court of Appeals, reversing the lower court, this court, in the case of the United States *vs.* Bessie Wildcat, (decided in May, 1917), has rendered an opinion on which plaintiffs in error believe they could rest their case without further statement; but, as defendant does not concede the binding application of that opinion to this case, counsel will undertake a full statement and argument.

THE PLEADINGS AND THE AGREED STATEMENT OF FACTS.

Appellee by its petition set forth (rec., p. 6) that Nicholas Alberson had been duly enrolled on a Chickasaw blood roll regularly approved by the Secretary of the Interior on December 12, 1902, after a finding that Nicholas had died October 2, 1902. That the United States District Court for the Southern District of the Indian Territory had duly appointed an administrator of his estate and that such administrator had duly selected the land in question as part of the allotment of Nicholas Alberson and that on September 17, 1904, the Commission of the Five Civilized Tribes, acting under the direction of the Secretary of the Interior, had issued allotment certificates to the administrator for the land selected. The statute made the administrator of a dead Indian the proper person to select his allotment and provided that the allotment thus selected should descend to the heirs of the deceased enrolled Indian.

It read (Choctaw-Chickasaw agreement of July 1, 1902; 32 Stats., 641):

> "SECTION 11. There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw Nations.
>
> SEC. 22. If any person whose name appears upon the rolls, prepared as herein provided, *shall have died subsequent to the ratification of this agreement* (ratification was Sept. 25, 1902) and before receiving his allotment of land, the lands to which such person would have been entitled, if

living, *shall be allotted in his name*, and shall, together with his proportionate share of other tribal property, *descend to his heirs* according to the laws of descent and distribution as provided in Chapter Forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor.* If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, *the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.*

SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein.

SEC. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

SEC. 35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw Tribes, *and those whose names appear thereon shall participate* in the manner set forth in this agreement: *Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement.* The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death be-

fore the date of the final ratification of this agreement, *and any person or persons* who may conceal the death of any one on said rolls as aforesaid, for the purpose of profiting by the said concealment, and *who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited* by *this section*, shall be deemed guilty of a felony and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto *a forfeiture to the Choctaw and Chickasaw Nations of the lands, other tribal property and proceeds so obtained.*

SEC. 71. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Choctaw or Chickasaw Tribes, as provided in this agreement, no contest shall be instituted against such selection."

The law made the allotment so selected saleable by the heirs (Mullen *vs.* U. S., 224 U. S., 448), although the Department of the Interior at the time the instant case was filed held to the contrary, and in its answer to the mandamus petition made such allegation one of its grounds of defense.

The petition then alleged that on September 19, 1904, B. F. Alberson, an enrolled Indian, had sold the land here involved to Emma Gamblin for $1,250, representing and reciting in his deed that he was the sole heir of Nicholas Alberson and that Nicholas Alberson had died *October 2, 1902.* The petition alleged that the price paid was adequate at the time and that the purchase was made without knowledge of any fraud, if any had been prac-

ticed, in securing the enrollment of Nicholas Alberson. It recited that thereafter Emma Gamblin took peaceable possession of the land (p. 7), but that on August 29, 1905, Lizzie Apala Taylor and Cornelia James had filed a bill in equity in the United States District Court claiming that Nicholas Alberson had died intestate *October 2, 1902*, and that the plaintiffs were entitled to a one-half interest in the allotment of Nicholas as children of a brother who had predeceased Nicholas. The petition averred that this suit was settled by the entry in the spring of 1907 of judgment in favor of Emma Gamblin, the plaintiffs Taylor and James for $1,190 paid them having executed a warranty deed dated February 18, 1907, which was placed in escrow thereupon and recorded March 25, 1907, conveying all their interest in the land to Mrs. Gamblin.

The consideration paid to the Taylor and James women, the petition recited, was part of the sum of $6,500 for which Emma Gamblin in 1907 had agreed to sell 120 acres of the land to F. M. Head (p. 7), the predecessor of the townsite company

It alleged that Head had purchased the land after the title had been examined and report made by a title examiner that the title was perfect, this title examiner before reporting (p. 8) sending to the Dawes Commission the requisite fee and obtaining from it allotment certificates (in March, 1907, p. 34, misprinted May, 1907) to the land in question in order to record them in the land office of Stephens County where the land was located, as the original source of title. That the Dawes Commission in due course had forwarded the certificates to the title examiner without giving him any information that any claim had been raised and was under investigation in the Commission as to the date of death of Nicholas Alberson.

The petition alleged that after Head purchased the land it was conveyed to the Duncan Townsite Company, sub-divided, lots sold and houses erected thereon without knowledge of any claim that Nicholas Alberson had died too soon to be entitled to an allotment of land (p. 8).

The petition further recited that appellee had learned that the Secretary of the Interior had undertaken to make a notation on the approved rolls opposite the name of Nicholas Alberson as follows: "Died prior to September 25, 1902. Not entitled to land or money," and had issued orders that no patent should be issued in the name of Nicholas Alberson to any part of the land selected in the name of Nicholas Alberson and that no rights through him in any of the lands should be recognized The date of this notation and action of the Secretary, it may be stated at this point, was January 11, 1908 (rec., p. 35).

The act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, approved April 26, 1906 (34 Stat., 137) provided:

> "SEC. 2. * * * Provided, that the rolls of the tribes affected by this act *shall be fully completed on or before the fourth day of March, nineteen hundred and seven*, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."

The Indian Appropriation Act, approved June 21, 1906 (34 Stats., 325), provided:

> "That the Secretary of the Interior shall, *upon completion of the approved rolls*, have prepared and printed in a permanent record book such rolls of the Five Civilized Tribes and that one copy of

> such record book shall be deposited *in the office of the recorder in each of the recording districts* for public inspection"

Recording districts on statehood became counties. It was made a misdemeanor for any unauthorized person to copy, exhibit, give or sell such rolls

The act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes (35 Stat, 312) provided:

> "SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes, approved by the Secretary of the Interior, shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and * * * shall hereafter be conclusive evidence as to the age of said citizen or freedman."

The petition alleged that the notation made by the Secretary, or attempted be made by him, on the rolls, and the action he had directed to withhold patents, was taken and made because some time in 1906 (p. 9) after they had parted with all their interest in the lands, the heirs of Nicholas Alberson, the lands having largely increased in value by the growth of the town of Duncan, had in an exparte hearing before the Dawes Commission sworn that they were drunk when they testified in order to get Nicholas' name on the rolls that he had died October 2, 1902, and that the truth was he had died prior to September 25, 1902.

The petition averred that on October 28, 1907, the Dawes Commission had undertaken to render a decision, finding that Nicholas Alberson had died prior to September 25, 1902, and that the allotment made in his name should be canceled.

The petition alleged that a copy of this purported decision had been mailed to the administrator of Nicholas Alberson and his attorney, informing them they might show cause why the allotment selection should not be canceled, and that the parties notified, giving no heed to the notice, the Secretary of the Interior, on January 11, 1908, had undertaken to place a notation on the final approved roll (p. 10) and to cancel the allotment made years previously. The petition alleged that no notification had been sent to the petitioner or its grantors and no opportunity afforded them to be heard in the matter (p. 10). It alleged that petitioner had made demands that patents be executed and recorded in the name of Nicholas Alberson to the lands in question, but that these demands had been refused and that instead the petitioner had been informed by the Secretary that he intended to allot the lands to others and that he purposed to issue patents to the lands to other persons, unless otherwise commanded by judicial proceedings.

The petition averred that the action taken by the Secretary had caused and would cause petitioner great and irreparable injury and that the arbitrary and unlawful act of the Secretary in canceling so much of the allotment of Nicholas Alberson as was purchased bona fide by petitioner and refusing to permit the same to be patented in the name of Nicholas Alberson, and instead of attempting to allot the same to others was a deprivation of property of petitioner without due process of law. The writ of mandamus was prayed, with the usual prayer for general relief.

The material averments of the petition may be accepted by the court as true, for after answer had been filed by the Secretary, attacking the bona fides of peti-

tioner and all its grantors subsequent to the Indian heirs, testimony was taken which fully and completely disproved all the averments in this respect of the answer. This is conceded in the agreed statements of facts (p. 32). This agreed statement stipulated that Nicholas Alberson had died prior to September 25, 1902, but conceded that neither petitioner nor any of its grantors after the Indian heirs were aware of this fact and conceded that they and each of them purchased the land (p. 36) "and paid just and valuable considerations therefor in good faith and without any knowledge but that Nicholas Alberson was alive, as their conveyances recited, at a date subsequent to September 25, 1902." The agreed statement further admitted (p. 35) that each and all of the purchases were made "without notice of any claim that Nicholas Alberson had died prior to September 25, 1902, and it was established that the allegations of fraud, actual or constructive, made against Emma Gamblin, F. M. Head, or either of them, in the amended answer, were not well founded in fact."

The agreed statement also conceded the regularity of all proceedings leading up to enrolment and allotment and that the Secretary had decided in 1908 that Nicholas Alberson should not have been enrolled, so that the only question left open was whether an innocent purchaser for value without notice may obtain a writ of mandamus perfecting in the Department of the Interior his title to an allotment where, after the rolls are closed and completed, it is ascertained by the Secretary of the Interior that an error of fact had been made in the original enrolment and allotment owing to the allottee having died too soon to have been entitled to enrolment and allotment.

The Court of Appeals held that notwithstanding the

closing of the rolls the Secretary still had jurisdiction to make notations on the rolls and to cancel allotment certificates issued to allottees dying too soon; that it would be to perpetuate a fraud to compel the Secretary to issue a patent to inure to petitioners' benefit; and that petitioner could not have its rights adjudicated in this jurisdiction, but, if it has any rights at all, must wait until the lands are allotted to others and then assert them in Oklahoma.

Assignment of Errors.

1. That the Court of Appeals erred in reversing the judgment of the Supreme Court of the District of Columbia.

2. That the Court of Appeals erred in holding that it would be to perpetuate a fraud and command the Secretary to perform an unlawful act to cause a patent to issue to inure to the benefit of petitioner, the record being conclusive that petitioner is the purchaser of the land and innocent of any fraud and is the real beneficiary of the action.

3. That the Court of Appeals erred in not holding that the Secretary of the Interior was without jurisdiction as to the rolls after March 4, 1907, and that the only remedy after that day was by proceedings in equity to forfeit any rights held through a fraud perpetrated in obtaining enrolment.

4. That the Court of Appeals erred in not holding that after the land had been selected in allotment and allotment certificates issued in the name of the deceased Indian the issuance of patent was merely a ministrial act and would be compelled wherever the real party in interest was entitled on the merits and as one coming with clean hands asking the aid of the court.

5. That the Court of Appeals erred in not holding that a refusal to issue a patent for the benefit of plaintiff in error was a denial to it of due process of law.

6. That the Court of Appeals erred in holding that the only remedy, if any, of petitioner was to await the patenting of the land in controversy to others and then for the various lot owners to assert their several equitable rights.

Argument.

It is admitted in the agreed statement of facts, drafted by the defendant, after full testimony taken and the trial court had found fully and completely the bona fides of plaintiff in error and its grantors that plaintiff is a lawful purchaser of the lands here involved for full value and in undoubted and undoubting reliance on the verity of the Government rolls, which were completed and closed, and the fact that the Secretary of the Interior had found that the deceased Indian and his heirs were entitled to the allotment of lands and had evidenced his finding by issuance to them of an allotment certificate as (sec. 23, act of July 1, 1902; 32 Stat., 641; rec., p. 4) "conclusive evidence of the right of the allottee to the tract of land described therein."

It was not until after March 4, 1907, that plaintiff purchased the lands, and the Secretary of the Interior, without notice to plaintiff or its grantors, thereafter undertook to deprive the late Nicholas Alberson of his enrolled and allotted status.

In Lowe *vs.* Fisher, 223 U. S., 95-107, this court held that until March 4, 1907, the Secretary of the Interior might, with notice and an opportunity to be heard, cancel

enrolment, but likewise held by a parity of reasoning that after March 4, 1907, no such power existed, jurisdiction having become exhausted. This court said the Secretary had "power of revision and correction until the final moment when jurisdiction was expressly taken away from him, as provided in section 2 of the act of April 26, 1906, that is, the 4th day of March, 1907."

It is submitted that this opinion and decision was a square recognition and announcement of what is the plain wording of the enrolment statutes, namely, that the rolls were closed March 4, 1907, and thereafter should be spread on the county land records as notice on which all could rely and was an express holding that after March 4, 1907, the Secretary of the Interior was without jurisdiction of any matter involved in enrolments—of course, judicial jurisdiction in proper cases remaining.

In Garfield *vs.* U. S. ex rel, Goldsby, 211 U. S., 249, this court held:

> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In U. S. *vs.* Wildcat, decided in May, 1917, this court held:

> "On October 10, 1906, the Commission reported that the testimony showed that Thlocco died before April 1, 1899, and recommended that his name be stricken from the roll, and requested the

> Attorney General to take action to set aside the allotment deeds. We think this action entirely ineffectual to annul the previous action of the Government in placing Thlocco's name upon the roll and issuing in his name the certificate and patents, as we have stated. Such action could not be legally taken without notice to the heirs and was void and of no effect."

In Knapp *vs.* Alexander Co., 237 U. S., 169-169, this court, in a public land case, held that an entryman would be denied due process of law if he were sought to be bound by a compromise between the Department of the Interior and a wilful trespasser on the lands subsequently patented to the entryman, where the entryman had no notice of the proceedings between the land department and the trespasser, and that, consequently, he could recover of the trespasser and have his damages measured as for a wilful trespass, notwithstanding under the compromise the trespasser had paid a sum of money in settlement to the department, which had measured damages as for a simple trespass.

In Ballinger vs. U. S. ex rel Frost, 216 U. S., 240, this court held that an allotment certificate vests land in the allottee in advance of issuance of patent. It said:

> "Whenever in pursuance of the legislation of Congress rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior. * * *.
>
> "The relator selected the land in controversy * * *. Notice was given, as required, and the time in which contest could be made—nine months—elapsed. *Thereupon, as provided by the statute, the title of the allottee to the land selected*

> *became fixed and absolute,* and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. *They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered."*

In Noble *vs.* Union River Logging R. Co., 147 U. S., 165, this court said:

> "We have no doubt that the principle of these decisions (that the courts will command executive ministerial acts) applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires,* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in Board of Liquidation *vs.* McComb, 92 U. S., 531, 541, 25 L. Ed., 623, 628: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent

> it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.'"

In Knox Co. Comrs. *vs.* Aspinwall, 21 How., 539, this court held:

> "Mandamus is a remedy to compel performance of some duty required by law, where the party seeking relief has no *legal* remedy and the duty sought to be enforced is clear and indisputable."

In Marbury *vs.* Madison, 1 Cranch, 137, this court early held that the propriety of issuing a mandamus is determined by the nature of the thing to be done.

In Kentucky *vs.* Dennison, 24 Howard, 66, this court held that under the American system mandamus has been assimilated to the nature of an ordinary remedy and that it is nothing more than the ordinary process to which every one is entitled where it is the appropriate process.

The writ in State *vs.* Hollingshead, 47 N. J. L., 439, it was held should be applied for by the real party in interest. That mandamus is a remedial process is so well settled at this day as to need no citation of authorities.

In Smalley *vs.* Yates, 36 Kans., 519, it was held that when a person desires to be placed in the possession of a right, illegally and unjustly withheld from him, the writ of mandamus is a proper remedy to compel the delivery of the thing itself, the withholding of which constitutes the injury complained of.

When the Secretary of the Interior undertook subsequent to March 4, 1907, to revise the rolls which the statute declared, and this court has held, were closed

and completed on that day, he exceeded his jurisdiction and his attempted action was *ultra vires* and void. Notwithstanding that fact, however, it did as this court held in the Goldsby case: cast a cloud on the property rights of petitioner which it was entitled to have removed—the court holding that mandamus was the proper direct and adequate method of obtaining the necessary relief, as it did in the Frost case, that mandamus to compel patent was the appropriate remedy where, as here, the evidence of rights and security a land patent affords is sought.

The act of April 26, 1906, declared that the rolls "shall be fully completed on or before the 4th day of March, 1907." A later act of the same year, as quoted, provided that "upon completion of the approved rolls" they should be printed in a permanent record book and deposited for public inspection in the several recording districts, later counties after statehood, where land transfers were to be recorded. Why?

As a record to be relied upon or as one not to be relied upon? It is respectfully submitted that these provisions negative completely any contention that persons purchasing in good faith, upon the strength of these public records, the allotment of a deceased Indian made the purchase at his peril and could not rely upon the public records; that they could create towns and build improvements and be at the mercy of subsequent changes by the Secretary.

In Johnson *vs.* Towsley, 13 Wallace, 83, this court held that the word final in a land act meant that the decision of the Commissioner when the statute declared his decision "final" excluded further inquiry in the department. When the statute declared the rolls complete and provided they should be spread upon the county records, it precluded any subsequent interference with those rolls or

allotments under them by the Secretary of the Interior, and any action by him with reference to them that would militate in any wise against the rights of a bona fide purchaser of lands from the party previously adjudged by the Secretary of the Interior to have been entitled lawfully to allot them.

Why should Congress provide for the filing of copies of these rolls in each land district and provide penalties for unauthorized persons having or bartering copies of these rolls if purchasers of lands, after the rolls were completed, could not rely upon the same and be protected in so doing. It provided specifically that forfeitures where enrolments were erroneously made of persons dying too soon should be limited to the fraudulent profiters (Sec. 35, Act of 1902).

It provided for allotments on the basis of enrolments, and if the enrolled did not select an allotment, that the Dawes Commission should do so. If the Dawes Commission did so on behalf of one who "died too soon" and the heirs lawfully sold the land, would the purchasers be remediless? Could the Dawes Commission and the Secretary of the Interior impeach their own allotments where purchased later by innocent persons?

The Secretary of the Interior has no inherent power of forfeiture and the right of forfeiture is in all cases to be exercised only in two ways (New York Indians, 175 U. S., 1). The statute in general terms provided for the forfeiture (Sec. 35 of Act approved July 1, 1902; 32 Stats., 641) of lands or proceeds of sales of lands where an enrolled person had died too soon. That forfeiture, however, obviously was not to be declared by the Secretary, but in the way open under the New York Indian case, *supra,* namely, by resort to a court of equity. And

the statute expressly limited and confined this forfeiture to persons *knowingly* receiving lands, proceeds of same, or other tribal property and intending to profit in fraud of the fact that the Indian had died too soon. Obviously, this careful expression of limitation of forfeiture was designed for the protection of innocent purchasers, like plaintiff in error, who were proceeding in reliance on the Government records to fulfil the main original expressed purpose of Congress in all its Five Civilized Tribes' legislation since 1893, namely, to fit Oklahoma for statehood.

If the Secretary and the courts have no power of forfeiture of the rights acquired by plaintiff in error, under what principle of law can the petitioner be denied due process of law and refused simple, direct and adequate relief such as issuance of patent to it will give. Necessarily the Secretary will not issue patent to, or undertake to, allot the land in ten-acre or other large lawful allotments to others if compelled by mandamus to patent to petitioner. The time for contesting allotments has long since expired.

If petitioner is, as the record shows it and all its grantors after the Indian are, purchasers in good faith, plaintiff in error is entitled to the land and to the most efficacious relief. It is not compelled, nor are the several town-lot purchasers and home-builders compelled to sit down and await the placing of a cloud on their lands by issuance of formal patents to one or a dozen other Indian allottees and then litigate with these claimants by patent or buy them off as holders of a cloud on the title. Such proceedings by the Secretary would be but to perpetuate the fraud and aid the secret sinister purpose of the Alberson's in attempting, after Duncan had grown rap-

idly and they had sold the lands, to undo the enrolment of Nicholas.

It is no answer to say that petitioner, having acquired vested rights as an innocent purchaser, can hereafter defend those rights. A similar contention was advanced by the Government in Garfield *vs.* U. S. ex rel. Goldsby, 211 U. S., 249, the Government's contention being thus set forth in 53 Law Ed., 169:

> "If, by reason of the selection of land made to him, the relator has acquired any vested rights therein, as he alleges, he can assert them in the proper court after the title to the land has passed from the United States and the Chickasaw Nation."

This court refused to heed that contention.

Grant of patent to petitioner would not prevent assertion of rights if at any time in the future any person should *by chance* appear, having a better equitable right than plaintiff in error, *though none such are known*, since they would not be bound by these proceedings (Knapp *vs.* Alexander, *supra*).

As said in Wilkie *vs.* Howe, Treasurer, 27 Kans., 518:

> "A judgment in an action of mandamus to compel a legal duty in a land matter will not determine the question of title adversely to other claimants or prejudice the rights of any other person as claimant or otherwise to the premises."

But a judgment in this case will by its ministerial operation give to petitioner the final evidence of patent to that to which it is entitled as purchasers of the allotment certificates and lands covered thereby and be to it a

shield such as not otherwise can be so adequately had and obtained.

It is no answer to the rights of petitioner to say, as did the Court of Appeals (p. 39) that "the party seeking its relief must come into court with clean hands and with a clear legal right, for which the law affords no adequate remedy. The writ will not, therefore, issue to compel the performance of a wrong or to confirm or perpetuate a fraud."

The petitioner does come into court with clean hands. That the hands of the Albersons are unclean does not imply or evidence, in fact or in law, that plaintiff's hands are unclean. The record shows plaintiff's hands and all its grantors after the Indians are white and pure. In matters of due process the court looks at substance (Simon *vs.* Craft, 188 U. S.)

Petitioner shows a clear legal right, *vide* Ballinger *vs.* Frost, *supra.* No other remedy can be as adequate or so relieve petitioner from vexation, harassment and property clouds.

The writ will not perpetuate a fraud. It will not compel performance of a wrong. The Court of Appeals has erred in treating this case as though it were the heirs of Nicholas Alberson who were here. So to hold would be to hold that petitioners have no right to "due process" and administration of the law of the land in the land department. It compels performance of no wrong to compel patent to issue where it clearly appears, as here, that its benefits accrue to innocent purchasers. It perpetuates no fraud. The fraud dies when the land passes into the hands of the innocent purchasers free from clouds sought to be placed thereon by the fraudulent Albersons or their manipulators.

Granted that even though all that remains is a ministerial act, the courts would not compel patent to issue, if, as in Garfield *vs.* Turner 222 U. S., 204, under the concessions of that demurrer, it would be compelled immediately to forfeit the rights acquired upon the filing of a bill in equity by the United States, the court has no such case before it; the courts would not cancel or forfeit the rights of plaintiffs in error if bill in equity were filed but would confirm their rights; it is here trying the rights of the Duncan Townsite Co. and not of the heirs of Alberson.

A reversal of the ruling of the Court of Appeals is in accord with the opinion of this court in U. S. *vs.* Wildcat, *supra;* of the Federal courts in two "dying-too-soon" cases (U. S. *vs.* Jacobs, 195 Fed., 709 and U. S. *vs.* Marshall, 210 Fed., 595), and of a line of Oklahoma State decisions, of which Godfrey *vs.* Iowa Land & Trust Co., 95 Pac., 792, is a fair type.

The opinion of the Court of Appeals is clearly illogical, unsound and in denial of constitutional rights, and should be reversed with directions to affirm the judgment and order of the Supreme Court of the District of Columbia.

Respectfully submitted,

CHAS. H. MERILLAT,

CHAS. T. KAPPLER,

Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE DUNCAN TOWNSITE COMPANY, plaintiff in error, *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 51.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT.

The writ of error in this case (R. 40) brings up for review a judgment of the Court of Appeals of the District of Columbia (R. 39) reversing a judgment of the Supreme Court of the District (R. 29) which awarded a writ of mandamus directing the Secretary of the Interior to issue or cause to be issued and to be recorded a patent to certain lands in the name of Nicholas Alberson as his allotment in the Chickasaw Nation.

The case was heard in the Court of Appeals upon the petition (R. 1–11), the amended answer (R. 21–28) and an agreed statement of facts (R.

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32–36). From these the following undisputed facts appear: Nicholas Alberson was enrolled during his lifetime as a member of the Chickasaw tribe about March 6, 1899, and without any further proof that he was alive on September 25, 1902, his name was included in the first partial roll of the tribe which was approved by the Secretary of the Interior December 12, 1902 (R. 21–22). "It is conceded and is to be taken as the fact that Nicholas Alberson died prior to September 25, 1902" (R. 36). By means of a false affidavit made by B. F. Alberson, a surviving brother of Nicholas Alberson, in which he swore that Nicholas died October 2, 1902, one L. P. Hudson, as administrator of the estate of Nicholas, procured the allotment in question to be made to Nicholas on September 20, 1904, and the issuance of certificates of allotment therefor to said Hudson as administrator on January 23, 1905, and April 7, 1906 (R. 33). By deeds dated September 19, 1904, and February 18, 1907, the heirs of the allottee conveyed the allotment to the grantors of the petitioner and plaintiff in error Duncan Townsite Company (R. 33–34). On January 11, 1908, after an investigation at which two of the three heirs were present and testified and after notice to said administrator and his attorney of record in the allotment proceedings, but without notice to said grantees whose deeds were of record in Oklahoma, the Secretary of the Interior, on the recommendation of the Dawes Commission, struck the

name of Nicholas Alberson from the rolls, canceled the allotment selections which had been made in his name, and allotted the land to other Indians (R. 34–35). The Duncan Townsite Company and its grantors "purchased said land as aforesaid and paid just and valuable considerations therefor in good faith and without any knowledge but that said Nicholas was alive, as their conveyances recited, at a date subsequent to September 25, 1902 " (R. 36).

It should be noted that, although the petition of the Townsite Company prayed for a writ commanding the Secretary to restore the name of Nicholas Alberson to the rolls as well as to issue and record a patent in his name (R. 11), the writ as awarded by the trial court only commanded the issuance and recordation of the patent (R. 29). To this judgment the Townsite Company made and now makes no objection.

No Assignment of Errors.

The writ of error in this case was allowed and issued without an assignment of errors (R. 39–40) in violation of the law and the rules of this court. (Revised Statutes, sec. 997; rule 21, par. 4; rule 35; Judicial Code, sec. 250, concluding paragraph; rule 40.) For this reason, notwithstanding the specifications of alleged error in the brief of counsel, the case may be dismissed or the court

may, for special reasons, exercise the option reserved under rules 21 and 35 of examining the transcript that it may be advised as to whether there has occurred any "plain error" which obviously demands correction. *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 552; *Briscoe* v. *District of Columbia*, 221 U. S. 547, 549. In anticipation of a possible exercise of this option we proceed to answer the argument advanced for the plaintiff in error.

The Questions Presented.

The brief for plaintiff in error specifies six alleged errors (p. 12), but they are not separately presented, and no proposition deducible from them or either of them is particularly stated. With some difficulty, therefore, in understanding the points made in behalf of the plaintiff in error, we maintain the following counter propositions:

1. The Secretary of the Interior has power to annul the allotment for fraud and perjury in its procurement at any time prior to issuance and recordation of the patent.

2. No patent having issued, the plea of innocent purchaser is of no avail as against the power of the Secretary to annul the allotment for fraud and perjury.

3. The writ of mandamus is never granted to promote an admitted fraud and render its undoing more difficult.

ARGUMENT.

I.

The Secretary of the Interior Has Power to Annul the Allotment for Fraud and Perjury in its Procurement at any Time Prior to Issuance and Recordation of the Patent.

It is contended for the plaintiff in error that the certificates of allotment issued in the name of Nicholas Alberson are conclusive evidence against the Secretary of the Interior of Alberson's title to the allotment. The foundation of this contention is section 23 of the Choctaw and Chickasaw agreement of July 1, 1902 (32 Stat. 641, 644), which reads as follows:

> Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

If by this provision it had been intended that allotment certificates issued by the Commission should conclude the authority of the Secretary, there would have been little scope for the directory

power conferred on him by immediately succeeding section 24, which reads as follows:

> Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

To enable him to exercise this directory and supervisory function after the issuance of allotment certificates, patents were provided for. If not for this purpose, they would be of little or no use . That the issuance of patents was deemed essential to administrative finality is manifested by sections 12, 16, 65 and 66, which are as follows (italics ours):

> 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and *separate certificate and patent shall issue* for said homestead.
>
> 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be *alienable after issuance of patent* as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the

balance in five years; *in each case from date of patent* * * *.

65. The *acceptance of patents* for minors, prisoners, convicts, and incompetents by persons authorized to select their allotments for them shall be sufficient to bind such minors, prisoners, convicts, and incompetents as to the conveyance of all other lands of the tribes.

66. *All patents to allotments* of land, when executed, *shall be recorded* in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for *record of land titles* as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

The Atoka Agreement provision here referred to is (30 Stat. 508):

> That the United States shall provide by law for proper *records of land titles* in the territory occupied by the Choctaw and Chickasaw tribes.

Further provision was made as to all of the Five Civilized Tribes by section 5 of the act of April 26, 1906 (34 Stat. 137, 139), that—

> *all patents or deeds to allottees* and other conveyances affecting lands of any of said tribes *shall be recorded* in the office of the Commissioner to the Five Civilized Tribes, *and when so recorded shall convey legal*

> *title*, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same.

No provision is anywhere made for recording allotment certificates or that they shall be evidence of title. The concluding part of section 23 shows that the whole section is concerned with the right of possession; and if any proper effect is to be given the provisions for passing title by patent, the "right" of which allotment certificates are made "conclusive evidence" must be such right of possession as against intruders or rival claimants, and not the right to a patent as against all administrative authority of the Secretary.

The analogy of allotment certificates to final certificates of entry under the public land laws is complete, and the same rule with respect to the authority of the Secretary has been applied, namely, that until the issuance of patent the legal title remains and with it the power of the Secretary to annul the allotment for fraud.

Section 21 of the Cherokee Agreement of July 1, 1902 (32 Stat. 716, 718), is identical in substance with section 23 of the Choctaw and Chickasaw Agreement. In *Lowe* v. *Fisher*, 223 U. S. 95, 96, 106, the petitioners urged the "conclusive character" of allotment certificates issued under the Cherokee Agreement, but the authority of the Secretary to annul the allotments on the ground of fraud was sustained. Mr. Justice McKenna, speaking for the court, said (p. 107):

> This revisory and corrective power of the Secretary over the allotment of land is similar to that exercised by the Land Department respecting the entries upon public lands, which this court has stated to be correct and annul entries of land which were made upon false testimony and without authority of law. *Cornelius* v. *Kessel,* 128 U. S. 456, 461; *Hawley* v. *Diller,* 178 U. S. 476, 490.

In *Knight* v. *Lane,* 228 U. S. 6, 9, it appeared that patents had been executed by the Principal Chief of the Cherokee Nation by direction of the Secretary and sent to the latter for approval, and the question was whether the Secretary yet had power to vacate his decision and withhold his approval of the patents. It was held that since the patents had not actually issued the legal title had not passed and that therefore the administrative authority of the Secretary had not been exhausted, the court by Mr. Justice Van Devanter saying (p. 12):

> Proper regard must also be had for the fact that the act of April 26, 1906, 34 Stat. 137, c. 1876, § 5, expressly contemplated that the title should not pass until the patent was recorded in the office of the Commissioner to the Five Civilized Tribes. In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department, which is well stated in the following excerpts from the opinion in *Brown* v. *Hitchcock,* 173 U. S. 473, 476–478:
>
> "Until the legal title to public land passes from the Government, inquiry as to all equit-

> able rights comes within the cognizance of the land department. In *United States* v. *Schurz,* 102 U. S. 378, 396, which was an application for a mandamus to compel the delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri,* the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.' "

This analogy between allotment certificates and public land certificates and the practice founded thereon of cancelling allotments for fraud or illegality at any time before patent is also shown by the opinions of Assistant Attorney General Lionberger, February 15, 1897 (24 L. D. 264), and Assistant Attorney General Van Devanter, September 25, 1900 (30 L. D. 258), both of which were approved by the Secretary of the Interior. See also *Lane* v. *Mickadiet,* 241 U. S. 201, 207–209.

Counsel for the plaintiff in error rely upon *Garfield* v. *Goldsby,* 211 U. S. 249, and *Ballinger* v. *Frost,* 216 U. S. 240, as sustaining a contrary doctrine. The same argument was advanced in *Knight* v. *Lane,* 228 U. S. 6, but the court, by Mr. Justice Van Devanter, said (p. 13):

> The decisions in *Garfield* v. *Goldsby*, 211 U. S. 249, and *Ballinger* v. *Frost*, 216 U. S. 240, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator's right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding.

Counsel also rely upon *United States* v. *Wildcat*, 244 U. S. 111. But in that case the patent had been issued and recorded, and it was held that thereafter the Secretary was without authority to take any action in the matter.

Counsel for the plaintiff in error contend that all authority of the Secretary over allotments was taken away on March 4, 1907, by section 2 of the act of April 26, 1906, (35 Stat. 137, 138). The provision relied on reads as follows:

> That the rolls of the tribes affected by this Act [the Five Civilized Tribes] shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

This is very far from a declaration that after March 4, 1907, the Secretary shall be divested of all power to cancel allotments and refuse patents for allotments procured by fraud and perjury. It does not even purport to disturb the Secretary's power to correct the rolls by striking off the names of persons not entitled to be there, although there is a dictum to that effect in *Lowe* v. *Fisher*, 223 U. S. 95, 107. But however that may be, no complaint is now made of the action of the Secretary in striking off the name of Nicholas Alberson. The prayer of the petition for restoration of Alberson's name to the rolls (R. 11) was not granted by the trial court (R. 29) and as the petitioner interposed no objection to that judgment and did not appeal therefrom, the point has been abandoned. Moreover a lack of authority to strike names from the Chickasaw rolls would not affect the power to cancel a Chickasaw allotment before patent, for the Choctaw and Chickasaw Agreement contemplated rolls containing the names of persons not entitled to allotments. Section 35 contains the following (32 Stat. 649):

> No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided, That no allotment of land*

> *or other tribal property shall be made to any person, or to the heirs of any person whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement.* The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement. [Italics ours.]

The date of final ratification, in conformity with sections 73 and 74 (32 Stat. 657), was September 25, 1902 (H. Doc. No. 5, 57th Congress, 2d session, vol. 18, p. 41). It is shown by the amended answer that Nicholas Alberson was enrolled during his lifetime as a member of the Chickasaw tribe about March 6, 1899, and without further proof of his continued existence on September 25, 1902, his name was included in the first partial list approved by the Secretary December 12, 1902 (R. 21-22). In the agreed statement of facts it is stipulated: "It is conceded and is to be taken as the fact that Nicholas Alberson died prior to September 25, 1902" (R. 36), and that the allotment in question was procured by the administrator of his estate by means of a false affidavit made by a surviving brother of the deceased in which he swore that Nicholas died October 2, 1902 (R. 33).

The provision of section 2 of the act of 1906 above quoted relates only to the closing of the rolls against new applicants, not to the making of allotments or

the issuance of patents therefor. It was well known that many allotments had yet to be completed. In evident recognition of the necessity for continued administration of allotments, provision was made in section 5 of the same act (34 Stat. 138) for passage of title thereto by patents "to be hereafter issued." Section 32 of the act of June 25, 1910 (36 Stat. 855, 863), makes provision for patents which "have been or may be issued" in the name of Indians who died after allotment. And section 17 of the act of March 3, 1911 (36 Stat. 1069), authorizes the Secretary of the Interior to designate an employe of his department to approve such patents in the name and under the direction of the Secretary. Indeed the very foundation of the petition in this case is that such patents are yet necessary to pass the legal title, thus admitting the supervisory authority of the Secretary which attends the administration of allotments until that final step has been taken.

II.

No Patent Having Issued, the Plea of Innocent Purchaser is of no Avail as Against the Power of the Secretary to Annul the Allotment for Fraud and Perjury.

The fact that the plaintiff in error and its grantors purchased the allotment from the heirs of Nicholas Alberson and paid value therefor in reliance upon the allotment certificates and without knowledge of the fraud cannot affect the lawful

power of the Secretary to cancel the allotment before patent. They had no right of reliance upon the certificates. Patents alone were made evidence of title, and the lands were only "alienable after issuance of patent." (32 Stat 643, § 16). Assuming, however, that a conveyance before patent would become effectual upon its issuance as against the grantors, nevertheless, as against the Government and the tribe, the grantees took subject to the authority of the Secretary to annul the allotment on proper grounds. *Hawley* v. *Diller,* 178 U. S. 476, 485; *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 334.

It is objected that the proceeding which resulted in striking the name of Alberson from the rolls was taken without notice to the petitioner or its grantors. Two of the three alleged heirs whose conveyances are relied on as passing the title were present and testified at the annulment proceedings, and notice was given to the administrator who procured the fraudulent allotment and also to his attorney of record in the allotment proceedings (R. 34). The Secretary was not required to examine the local records in Oklahoma for the purpose of citing all possible grantees before patent. The recordation of the patent in the office of the Commission to the Five Civilized Tribes is the only proper record of these land titles. (*Supra,* p. 6; 32 Stat. 656, § 66; 34 Stat. 137, 139, § 5).

III.

The Writ of Mandamus is Never Granted to Promote an Admitted Fraud and Render its Undoing More Difficult.

The absence of all notice, or even of all proceedings by the Secretary, would not avail the petitioner. It being stipulated that the allotment was unauthorized and procured by fraud and perjury, the Secretary could even now proceed to annul it. In such a case, if the patent were issued, it would be the duty of the Secretary to ask the Attorney General to institute proceedings to set it aside. *Knight* v. *U. S. Land Association,* 142 U. S. 161, 178; *United States* v. *Stone,* 2 Wall. 525, 528. To issue the patent would be to promote the admitted fraud and render its undoing more difficult. The writ of mandamus was not designed and can not properly be used for such a purpose. *Turner* v. *Fisher,* 222 U. S. 204, 209, and cases cited.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

FRANCIS J. KEARFUL,
Assistant Attorney General.

November, 1917.

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the letter, disregards the spirit of the law. So *held* where the relator, purchaser in good faith and without notice of a fraudulent Indian allotment, sought to get in the legal title as against the United States by compelling the Secretary of the Interior to issue and record a patent.

44 App. D. C. 63, affirmed.

THE case is stated in the opinion.

Mr. Charles H. Merillat, with whom *Mr. Charles T. Kappler* was on the brief, for plaintiff in error.

Mr. Assistant Attorney General Kearful for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is a petition for a writ of mandamus brought in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw Agreement of July 1, 1902 (32 Stat. 641), and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission.

Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. These facts, now conceded, were established by the Commission to the Five Civilized Tribes; and the Secretary of the Interior upon recommendation of the Commission removed Alberson's name from the rolls, held the certificates for cancellation and allotted the land to others. Notice of the hearing before the Commission was given to Alberson's administrator and attorney of record, but not

DUNCAN TOWNSITE COMPANY *v.* LANE, SECRETARY OF THE INTERIOR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 51. Argued November 15, 1917.—Decided December 10, 1917.

An allotment certificate issued under the Choctaw-Chickasaw agreement of July 1, 1902, c. 1362, 32 Stat. 641, passes the equitable title only; the legal title remains in the United States until conveyed by patent, duly recorded, as provided by § 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and the allotment in the meantime is subject to be set aside, by the Secretary of the Interior, for fraudulent procurement.

The doctrine of *bona fide* purchase will not aid the holder of an equity to overcome the holder of both the legal title and an equity.

Mandamus is a discretionary remedy, largely controlled by equitable principles; it will not be granted to promote a wrong—to direct an act which will work public or private mischief, or which, while within

to the relator, who had, under the Oklahoma law, recorded the deed assigning the certificates and was in actual possession of the premises. The certificates had issued on or before April 7, 1906. The notation removing Alberson's name from the rolls was made January 11, 1908. The relator purchased the certificates before January 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supreme Court entered judgment for the relator, commanding issue and record of the patent, but making no order in respect to restoring Alberson's name to the rolls. The relator acquiesced in the judgment; but on writ of error sued out by respondent the judgment was reversed by the Court of Appeals (44 App. D. C. 63); and the relator brings the case here on writ of error.

The nature of the Choctaw-Chickasaw Agreement [1] and the rights incident to enrollment and allotment have been frequently considered by this court. Enrollment confers rights which cannot be taken away without notice and opportunity to be heard. *Garfield* v. *Goldsby*, 211 U. S. 249. Certificates of allotment, like receiver's receipts under the general land laws, entitle the holder to exclusive possession of the premises; Act of July 1, 1902, § 23, 32 Stat. 641–644; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337–8. But enrollment and certificates may be cancelled by the Secretary of the Interior for fraud or mistake, *Lowe* v. *Fisher*, 223 U. S. 95; because although the equitable title had passed, *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 593, the land remains subject to the supervisory power of the Land Department, *Knight* v. *Lane*, 228 U. S. 6, until issue of the patent, *United States* v. *Wildcat*, 244 U. S. 111, unless under the statute the power expires earlier by lapse of time. *Bal-*

[1] See, e. g., *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Woodward* v. *de Graffenried*, 238 U. S. 284.

linger v. *Frost*, 216 U. S. 240. Under § 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the legal title can be conveyed only by a patent duly recorded. *Brown* v. *Hitchcock*, 173 U. S. 473, 478. The provision in § 23 of the Act of July 1, 1902, that "allotment certificates issued by the Commission to the Five Civilized tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein" has relation to rights between the holder and third parties. The title conferred by the allotment is an equitable one, so that supervisory power remained in the Secretary of the Interior.

We are not required to decide whether (as suggested in *Lowe* v. *Fisher*, 223 U. S. 95, 107) the power to remove Alberson's name from the rolls had, because of § 2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a *bona fide* purchaser for value. But the doctrine of *bona fide* purchaser for value applies only to purchasers of the legal estate. *Hawley* v. *Diller*, 178 U. S. 476, 484. It "is in no respect a rule of property, but a rule of inaction." Pomeroy, Equity Jurisprudence, § 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone* v. *Chiles*, 10 Pet. 177, 210.

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the

strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.[1] The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See *Turner* v. *Fisher*, 222 U. S. 204. The judgment of the Court of Appeals is

Affirmed.